Supreme Court, U.S.
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01107 5 DEC 17 2001

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No. 01-

IN THE
Supreme Court of the United States

UNITED STATES EX REL. ABRAHAM GALE,

Petitioner,

v.

ZENITH DATA SYSTEMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

The False Claims Act, first passed 1863, is the Government's most potent remedy against fraud. The *qui tam* provisions authorize suits by whistleblowers on behalf of the United States. After *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943), construed the Act to allow *qui tam* actions based upon information in criminal indictments, Congress banned virtually all private suits. In 1986, Congress reinstated *qui tam* jurisdiction and substantially increased incentives and protection for whistleblowers, eliminated the "government knowledge" defense, and shifted the bar to suits based upon three types of publicly disclosed allegations of fraud [§ 3730(e)(4)(A)] unless the relator was the original source [§ 3730(e)(4)(B)] for at least some of the information [§ 3730(d)(1)] on which the allegations are based. The Ninth Circuit broadly extended the jurisdictional bar to preclude suits in which the whistleblower learns some of the information during a privileged conversation with an Assistant U.S. Attorney. Accordingly, the questions for review are:

1. Can a U.S. Attorney's private confidential privileged disclosure to a whistleblower during an ongoing investigation in a sealed case be a sufficiently public disclosure under 3730(e)(4)(A) to jurisdictionally bar the whistleblower's subsequent complaint?

2. If so, does the district court nevertheless have jurisdiction under 3730(e)(4)(B) because the whistleblower is an "original source" of the investigation leading to the complaint and/or some of the information on which it's allegations are based?

PARTIES TO THE PROCEEDINGS

Petitioner is the plaintiff and appellant below, Abraham Gale. He was Manager of the Computer Department at Packard Bell-NEC (PBNEC) that disassembled used computers, placing these "used" parts in the "new parts" inventory. He was terminated in December, 1994, for objecting to the fraudulent practice of charging the Government "new" prices for computers assembled from an inventory of mixed new and used parts. Gale received a 15% relator's share in his *qui tam* case against PBNEC. Gale is the plaintiff and appellant in the instant *qui tam* case against Zenith Data Systems, alleging that ZDS sold the Government computers containing used parts manufactured by PBNEC.

Zenith Data Systems (ZDS) is the respondent, the defendant and appellee in a second qui tam case filed by Gale. Zenith sold computers to the Government manufactured by Packard Bell-NEC (PBNEC) under an alliance agreement beginning in 1993, with ZDS holding 20% of PBNEC. ZDS became a wholly-owned subsidiary of PBNEC in April, 1996, and a division in 1997.

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OPINIONS BELOW

Petitioner Abraham Gale respectfully petitions for a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit to review *Seal 1, Seal 2 v. Seal A*, Docket No. 98-56447, reported at 255 F.3d 1154 (9th Cir., July 5, 2001), and reproduced at App. A, 1a-17a. The unreported August 5, 1998 opinion of the United States District Court for the Central District of California dismissing the Complaint for lack of jurisdiction under 31 U.S.C. § 3730(e)(4) is reproduced at App. B, 18a-29a.

STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. § 1331. The Ninth Circuit entered its opinion and judgment on July 5, 2001, and denied a timely filed petition for rehearing and suggestion for rehearing en banc on September 18, 2001. App. C, 30a-31a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS PETITION

The False Claims Act (FCA), 31 U.S.C. § 3729, *et seq.*, authorized Gale's *qui tam* action against ZDS for defrauding the Government by overcharging it for used computers sold as new. The district court had subject matter jurisdiction over Gale's action because there was no pre-filing public disclosure of fraud allegations in at least one of three methods. Even if the Government's confidential privileged disclosure that it was initiating an investigation to see if PBNEC manufactured computers for ZDS containing used parts from Gale's department was sufficiently "public" to trigger the bar, the district court nevertheless retained jurisdiction because Gale was the "original source" for the investigation and for the critical fraud allegation in his ZDS complaint. This Court should resolve the circuit split concerning the scope and application of "public disclosure" and "original source." A correct interpretation of

these provisions is vitally important to the future of the FCA. The relevant provisions of the FCA are:

> §§ 3730. Civil actions for false claims
>
> * * *
>
> (d) Award to qui tam plaintiff.
>
> (1) * * * Where the action is one which the court finds to be based primarily on disclosures of specific information (other than information provided by the person bringing the action) relating to allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, the court may award such sums as it considers appropriate, but in no case more than 10 percent of the proceeds, taking into account the significance of the information and the role of the person bringing the action in advancing the case to litigation. * * *
>
> * * *
>
> (e) Certain actions barred.
>
> * * *
>
> (2) (A) No court shall have jurisdiction over an action brought under subsection (b) against a Member of Congress, a member of the judiciary, or a senior executive branch official if the action is based on evidence or information known to the Government when the action was brought. * * *
>
> (3) In no event may a person bring an action under subsection (b) which is based upon allegations or transactions which are the subject of a civil suit or

an administrative civil money penalty proceeding in which the Government is already a party.

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government [General] Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

Relator Abraham Gale brought his first action under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3729, *et seq*. (FCA), against Packard Bell-NEC, Inc. (PBNEC) on April 7, 1995 in the Central District of California. The Complaint alleged that PB defrauded the Government by selling computers containing used parts for the price of totally new computers. For himself as relator and for the Government, Gale sought treble damages (difference in market price between the totally new computers and the discount price that should have been charged for used computers) and statutory forfeitures ($10,000 per false claim).

By March, 1996, a dispute had arisen between Gale and the U.S. Attorney's Office (USAO) over whether the PBNEC Complaint covered computers sold by PBNEC's sister company (and now subsidiary) Zenith Data Systems (ZDS). The district court ultimately ruled in Gale's favor that the PBNEC complaint

was not jurisdictionally barred by a prior public disclosure, and awarded Gale a 15% share of the $3.5 million settlement. Gale filed the ZDS Complaint at issue here on April 16, 1996 to ensure that any ZDS liability was effectively prosecuted and to protect his rights as a relator.

The USAO and Defendants claimed that the court lacked subject matter jurisdiction because fraud allegations had allegedly been publicly disclosed before Gale filed his ZDS Complaint. Gale countered by demonstrating that private privileged statements to him were not "public" so as to raise the jurisdictional bar, and in the alternative, he was an "original source" of the ZDS allegations because he provided the information that triggered the Government's investigation of ZDS and he had prior knowledge of the key fraud allegation in the ZDS complaint.

However, the court dismissed the ZDS Complaint based on a factual finding that Gale first learned of ZDS fraud allegations while reviewing PBNEC documents in the USAO and that he was not an "original source" of these allegations. The court also concluded as a matter of law that Gale's review of documents in the USAO was a public disclosure, and that there was not a sufficient nexus between the PBNEC and ZDS fraud allegations for Gale to remain a proper relator.

The Ninth Circuit affirmed. The panel improperly expanded the jurisdictional bar, substituting the repudiated "government investigation" defense for the statutory requirement of "public disclosure." The panel compounded its error by adopting an improperly narrow construction of the "original source" exception to the "public disclosure" jurisdictional bar, concluding that the district court lacked jurisdiction even though Gale initiated the investigation of PBNEC that led directly to the Government's inquiry into PBNEC manufacturing computers for ZDS and Gale was an "original source" of the core allegation in the ZDS complaint (PBNEC's comingling of used with new parts).

REASONS FOR GRANTING THE WRIT

Far worse than simply being wrong, and contrary to its own precedents, the Ninth Circuit's decision conflicts with the analytical framework set out in this Court's decision in *Marcus v. Hess*, conflicts with other circuits that have correctly analyzed the jurisdictional bar, and is an important case to the future of the FCA because it affords the Court the opportunity to clarify and simplify the jurisdictional analysis in this increasingly murky and convoluted area of the FCA, properly focussing not on what the Government "knows" but on what the relator brings to the case. The Ninth Circuit's faulty analysis so severely undermines the incentives for *qui tam* relators implemented by Congress in 1986 and so drastically increases the risks and uncertainty faced by relators that the future of the FCA as the most potent antifraud tool and deterrent is vitally at stake.

I. The Opinion Exacerbates a Growing Conflict Among the Circuits Over the Scope of a "Public" Disclosure and "Original Source."

A. Congress barred *qui tam* actions (unless brought by an original source) based upon disclosures in three specific and limited categories of public fora: (1) in a criminal, civil, or administrative hearing; (2) in a congressional, administrative, or Government [sic] Accounting Office report, hearing, audit, or investigation; or (3) from the news media. Until now,[1] no

1. In *Hughes v. United States ex rel. Schumer*, 520 U.S. 939 (1997), this Court granted a writ of certiorari to review, *inter alia*, the Ninth Circuit's holding that a limited disclosure to Hughes' employees of a government fraud investigation was not sufficiently "public" to trigger the bar. Because the Court resolved the case by holding that the 1986 amendments could not be applied retroactively, it expressed no opinion on the Ninth Circuit's "public disclosure" analysis. *Id.* at 945. The public disclosure/original source jurisprudence is in a state of mass confusion, made much worse by the panel opinion. The simplicity of the facts in this case and the generality of the panel's expansive construction of the jurisdictional bar and crabbed construction of the "original source" exception make this case an ideal vehicle to resolve the mass confusion among the circuits.

court has ever construed "public" to include confidential communications between government counsel and a relator concerning an ongoing investigation of a sealed case. The confusion[2] among the panels and circuits is due in part to

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2. In *United States ex rel. Merena v. SmithKline Beecham Lab., Inc.*, 114 F. Supp. 2d 352, 371-72 (E.D. Pa. 2000), Judge VanArtsdalen urged this Court to clear up the confusion:

> The False Claims Act has spawned a great amount of litigation throughout the United States. There are serious disputes among and within the judicial circuits who have confronted the issues raised by the statute as to the proper interpretation of various clauses of the statute. . . . There seems to be no unanimity both among and within individual circuits as to when claims are "based upon" public disclosures, what constitutes a public disclosure, when and under what circumstances a qui tam relator must first inform the government of the claims, the extent of the factual information that must be provided to the government prior to filing the qui tam action, when a qui tam action must be filed where there has been a public disclosure, what are the requisites to be classified as an "original source," when a claim is "primarily based upon" prior public disclosures and many other issues that arise under the statute. These questions will continue to plague and perplex litigants and the courts. . . . No doubt the number of qui tam cases that will be filed under the False Claims Act will increase. Indeed, one of the principal purposes of the most recent amendments to the Act was to encourage meritorious qui tam actions. . . . *I also hope that the United States Supreme Court will take the first opportunity it has to review the several inter-circuit conflicts as to the law.*

(citations omitted; emphasis added). The author of one of the leading FCA treatises has also urged this Court to resolve the "sharp dispute between the circuits:"

> Some courts interpreting Section 3730(e)(4)(A) have held that the statute provides an exclusive list of ways in which a public disclosure must occur for the jurisdictional bar to

(Cont'd)

their failure to properly implement the intent of Congress to limit the bar to a "*public* disclosure of allegations or transactions." The word "public" has an unambiguous clearly understood definition:

> pertaining to a state, nation, or whole community; proceeding from, relating to, or affecting the whole body of people or an entire community. Open to all; notorious. Common to all or many; general; open to common use.

Black's Law Dictionary Abridged 854 (6th ed. 1991).[3] The panel was not free to reject the ordinary meaning of "public disclosure" and redraft the jurisdictional bar more to its liking.

B. The panel's reasoning conflicts with other panels of the Ninth Circuit further illustrating the growing confusion over the proper analytical framework. A different panel held in *Wang v. FMC Corp.*, 975 F.2d 1412, 1416 (9th Cir. 1992), that

(Cont'd)

> apply, although courts are divided as to definitions of terms in the list. Others have applied the bar expansively by broadly defining "public disclosure" and the list of disclosure sources provided in the statute. *This remains an area of sharp dispute between the circuits that must be resolved by the Supreme Court.*

Boese, Civil False Claims and Qui Tam Actions § 4.02[B] (Supp. 2001-2) (footnotes omitted; emphasis added); *id.* at § 4.02[D] ("Indeed, in a relatively short period, the "original source" rule has become (along with "public disclosure") *the most litigated–and confused–issue under the qui tam provisions*." (emphasis added)).

3. A plain and ordinary meaning of "public" is "open to general observation, sight, or cognition, . . . manifest, not concealed," 12 Oxford English Dictionary, 2d ed. 780 (1989). This Court has traditionally relied on common-sense dictionary definitions of words in construing the FCA. *U.S. ex rel. Fine v. Chevron, USA*, 72 F.3d 740, 744 & n.4 (9th Cir. 1995) (en banc) (dictionary definition of "voluntary"); *U.S. ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991) ("public disclosure").

disclosure during discovery in the *qui tam* suit was *not* a public disclosure *with respect to Wang*. Citing *Wang*, the panel explained in *U.S. ex rel. Barajas v. Northrop*, 5 F.3d 407, 411 (9th Cir. 1993) that:

> In this case, the deficiency in the damping fluid was not disclosed during civil discovery, but as a result of the government's criminal investigation, which in turn may have been based on information Barajas had provided to the government. . . . [T]here is no reason to draw a distinction between disclosure resulting from civil discovery by the government or a *qui tam* plaintiff, and disclosure resulting from a criminal investigation by the government based on information provided by a *qui tam* plaintiff. *Such a distinction would allow the government to limit the potential recovery of qui tam plaintiffs unfairly simply by initiating a criminal investigation, and would subvert Congress's desire to combat fraud by providing broad incentives for qui tam suits.*

5 F.3d at 411 (emphasis added). It cannot be fatal to Gale that he learned information from discovery conducted by the USAO as opposed to his own. If the public disclosure of the defective damping fluid in a criminal indictment is not "public" with respect to Barajas, then any privileged private confidential disclosures to Gale cannot possibly be "public" solely with respect to Gale.

Another panel held in *Hagood v. Sonoma County Water Agency*, 81 F.3d 1465, 1476 (9th Cir. 1997), that relator's knowledge, gleaned from his work with the Corps, was *not* a "public disclosure." Hagood could use non-public information he learned from his government employment to file his suit. *U.S. ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416, 1419-20 (9th Cir. 1991) ("The United States has neither case law nor legislative history to support its extraordinary reading of a remarkably explicit jurisdictional statute."). It is simply

impossible to reconcile what Hagood learned (making him a proper relator) with the panel's conclusion that Gale was barred because of what he learned. If a former government employee can use information he learned from the government, *and (unlike Gale) was under no duty to keep secret*, to file an FCA action, then there is no logic in barring Gale (who was under a duty to keep his information confidential).

Still another panel stated in *U.S. ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1520 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997), that disclosure of audit reports to "innocent" employees was not public. "Under a 'practical, commonsense interpretation' of the jurisdictional provisions, information that was 'disclosed in private' has not been publicly disclosed." *Id.* at 1518. The *Schumer* panel went on to note that treating disclosures to "innocent" employees as public would undermine the key Congressional objective because:

> any employee who receives word of government allegations would be barred from bringing suit. Contrary to Congress's intentions for the jurisdictional bar, the *Doe* rule "effectively shifts the standard from 'public disclosure' back to 'government investigation,'" so that government possession of information relating to fraud effectively forecloses *qui tam* suits. *Doe*, 960 F.2d at 326 (Walker, J., dissenting).

Id. at 1518-19. Congress specifically sought to diminish the government's ability "to sit on, and possibly suppress, allegations of fraud when inaction might seem to be in the interest of the government." *Id.*

The panel's attempt to distinguish Gale (public disclosure) from the employees in *Schumer* (private disclosure) cannot be reconciled with *Schumer's* approval of nonpublic disclosures to "strangers" to the fraud. Gale was not an "outsider" with

respect to the ZDS fraud. App. A. 13a-14a. It was the used parts from the department he managed (disassembling used and returned computers and commingling the used parts with the new inventory) that were ultimately used in the assembly of ZDS computers. Unlike Schumer, who was under no legal duty to keep quiet and did in fact profit by using information he learned from the government by filing his own *qui tam* suit, Gale, *arguendo*, learned about ZDS as part of the discovery process in his PBNEC *qui tam* suit, as part of a statutorily sealed[4] process that was private, privileged,[5] and confidential.[6] Contrary to the panel's assumption, App. A. 2a, 4a, 10a, 13a-14a, there was no separate "Zenith" investigation. The panel's limitation of the bar only to Gale, App. A. 14a, as opposed to the "public," demonstrates the circularity of its reasoning. If Gale is barred by the disclosure, as an outsider and member of the public, then so must be the public at large. The panel's construction of "public disclosure" to bar one member of the public at a time has no support in the text or legislative history and produces an absurd and untenable result. If, for example, discovery materials are not "public" until filed with the court, then it is impossible for confidential and privileged communications to Gale to be deemed "public" for purposes of the bar.

C. The panel's opinion expressly conflicts with cases from other circuits that require objective and affirmative acts of disclosure to the general public in the three listed fora to trigger

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4. *See, e.g., U.S. ex rel. Lujan v. Hughes*, 67 F.3d 242, 244 (9th Cir. 1995) (premature disclosure risks dismissal).

5. Any information learned by Gale could not possibly meet the "available to any member of the public" test because of the seal and the joint prosecution privilege. *U.S. ex rel. Burroughs v. DeNardi Corp.*, 167 F.R.D. 680 (S.D. Cal 1996).

6. The AUSAs assigned to work with Gale testified and provided declarations stating that their oral and documentary disclosures to Gale were strictly confidential.

the bar, for example, court files,[7] administrative proceedings;[8] government reports and Congressional hearings.[9]

The panel's crabbed analysis is consistent with decisions from the Second and Third Circuits holding that potential or theoretical availability to the general public is sufficient to trigger the bar, but this minority view has no support in the statute or legislative history, conflicts with the majority of decisions, and should be rejected by this Court.

The Third Circuit held in *U.S. ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Insurance Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991), that unfiled discovery material triggered the bar. Even though the memo on which the case was based was not made public and never filed with the court following its discovery during an earlier case, the court reasoned:

> We must assume from the absence of a protective order that the information disclosed in discovery is potentially accessible to the public. . . . disclosure of discovery material to a party who is not under

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7. *See, e.g., United States v. Bank of Farmington*, 166 F.3d 853, 860 (7th Cir. 1999) (dicta); *U.S. ex rel. McKenzie v. Bellsouth Tel., Inc.*, 123 F.3d 935, 939 (6th Cir. 1997); *Federal Recovery Servs., Inc. v. U.S.*, 72 F.3d 447, 450 (5th Cir. 1995); *U.S. ex rel. Springfield Terminal Railway v. Quinn*, 14 F.3d 645, 652-54 (D.C. Cir. 1994); *U.S. ex rel. Kreindler & Kreindler v. United Technologies*, 985 F.2d 1148, 1158 (2d Cir. 1993); *U.S. ex rel. Dick v. Long Island, Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990).

8. *See, e.g., U.S. ex rel. Grayson v. Advanced Management Technology, Inc.*, 221 F.3d 580, 582 (4th Cir. 2000); *U.S. ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-14 (8th Cir. 1994).

9. *See, e.g., U.S. ex rel. Findley v. FPC-Boron Employees' Club*, 105 F.3d 675, 687-88 (D.C. Cir. 1997); *U.S. ex rel. Fine v. MK-Ferguson*, 99 F.3d 1538, 1544 (10th Cir. 1996); *U.S. ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514 (10th Cir. 1996); *U.S. ex rel. Fine v. Sandia Corp.*, 70 F.3d 568, 569-70 (10th Cir. 1995).

> any court imposed limitation as to its use is a public disclosure under the FCA.

Id. at 1158.

The Second Circuit held in *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323-24 (2d Cir. 1992), that disclosure of an investigation during service of a search warrant to "innocent" employees of a government contractor was "public" for purposes of the bar. *See also United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999) ("Disclosure of information to [even a single] competent public official about an alleged false claim against the government we hold to be public disclosure within the meaning of §§ 3730(e)(4)(A) when the disclosure is made to one who has managerial responsibility for the very claims being made."); *United States ex rel. Fine v. MK-Ferguson*, 99 F.3d 1538, 1544-1545 (10th Cir. 1996) (disclosure of government audit report to state of Oregon triggered bar); *Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000, 1006 (10th Cir. 1996) (memorandum given to a representative of the AARP, a stranger to the fraud, triggered the public disclosure bar); *United States ex rel. Foust v. Group Hospitalization and Medical Services, Inc.*, 26 F. Supp. 60, 70-72 (D.D.C. 1998) (disclosure of audit inquiry during settlement negotiations triggered public disclosure bar); *United States ex rel. Gold v. Morrison-Knudsen Co.*, 870 F. Supp. 457. 459-60 (N.D.N.Y. 1994) (memo obtained by relator from army engineer triggered bar).

Moreover, the Third, Sixth and Seventh Circuits have expanded the scope of the bar to FOIA requests, even though this fora is not listed in § 3730(e)(4)(A).[10] However, the

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10. *See, e.g., United States v. A.D. Roe Co., Inc.*, 186 F.3d 717, 723-24 (6th Cir. 1999); *United States ex rel. Mistick PBT, v. Housing Authority*, 186 F.3d 376, 383-84 (3d Cir. 1999); *United States ex rel. Haskins*, 11 F. Supp. 2d 555, 568 (D.N.J. 1998); *United States ex rel. Lamers v. City of Green Bay*, 998 F. Supp. 971, 979 (E.D. Wis. 1998), *aff'd*, 168 F.3d 1013 (7th Cir. 1999).

Fourth Circuit recently held to the contrary, that FOIA disclosures did not trigger the bar because the list of fora in § 3730(e)(4)(A) was exclusive. *United States ex rel. Bondy v. Consumer Health Found.*, 2001 U.S. App. LEXIS 24238 (Nov. 9, 2001). In *United States ex rel. Pentagon Technologies Intl. v. CACI Intl.*, 1995 U.S. Dist. LEXIS 17512 (S.D.N.Y. 1995), the court also held that FOIA is not a public disclosure.

> Based upon this reasoning, Pentagen's reliance, if any, on allegations or transactions—or information without which it would not have thought of the allegations—contained within documents obtained under the FOIA does not compromise the court's jurisdiction because the documents acquired under the FOIA are not publicly disclosed within the meaning of §§ 3730(e)(4)(A).

Id. at 35-36.

The Seventh Circuit has expressly repudiated the Gale panel's holding that a private disclosure triggers the bar. *See Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 613 (7th Cir. 1995) (letter regarding allegations between co-defendants not a public disclosure); *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159, 1165 (S.D. Ind. 1998) (conversations between private co-defendants not public disclosure), *dismissal aff'd on other grounds*, 189 F.3d 542 (7th Cir. 1999).

The Gale panel's analysis was also squarely rejected by the Tenth Circuit in *United States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996):

> We believe that in order to be publicly disclosed, the allegations or transactions upon which a qui tam suit is based must have been made known to the public through some affirmative act of disclosure. . . . As to the other purpose of the Act—encouraging the exposure of fraud—the amended

> qui tam provisions seek to ensure that information bearing on potential fraud will come to light even if government officials should decide not to initiate proceedings based on information contained in government files. The previous incarnation of the Act required dismissal of a qui tam action once it was determined that "the action is based on evidence or information the Government had when the action was brought." 31 U.S.C. §§ 3730(b)(4) (1982) (superseded). The 1986 amendments changed the focus of the FCA's jurisdictional bar from information that the government simply had within its files to information or evidence which actually had been disclosed to the public. . . . Only when there is a positive act of disclosure to the public can the government "no longer throw a cloak of secrecy" around the allegations, for at that point the information has been "irretrievably released into the public domain." . . . [U]nder the 1986 qui tam amendments, the touchstone is actual public disclosure rather than mere knowledge of fraud. Nor do we draw any contrary conclusion from the fact that [the agency] (or the State of Oklahoma), had it been so inclined, could have beaten plaintiff to the courthouse and filed its own qui tam action on behalf of the United States.

Id. at 1519-21. *See also, e.g., United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-14 & n.2 (8th Cir. 1994) (disclosures of allegations and transactions in corporate reports and creditors' meetings do not trigger bar).

The panel's opinion also conflicts with decisions holding that federal employees can be relators (so long as their pre-filing disclosures are voluntary). *See, e.g., United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1417 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17, 20 (1st Cir. 1990)

("[§ 3730(e)(4)(A)] does not prevent government employees from bringing *qui tam* actions based on information acquired during the course of their employment but not as the result of a government hearing, investigation or audit or through the news media."); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72, 75 (E.D. Pa. 1991); *Erickson ex rel. United States v. Am. Inst. of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989). This analysis rejects the Government's argument that a public disclosure necessarily occurs when a government employee uses information learned in his official capacity to file a qui tam action as a private relator.

D. The panel's opinion conflicts with authority from other circuits, the express language of the FCA, § 3730(d)(1), and Congressional intent, by depriving Gale of up to a 10% relator's share, if not the full 15-30% range, even though he initiated the PB investigation that led the USAO to examine PB computers manufactured for ZDS.[11] Moreover, Gale was undisputedly the

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11. The panel's opinion cites but is irreconcilable with another Ninth Circuit panel opinion. The panel in *United States ex rel. Barajas v. Northrop*, 5 F.3d 407, 411 (9th Cir. 1993), set forth the entirely sensible rule that Gale is an "original source" of allegations "if he played some part, whether direct or indirect, in the public disclosure" of the Zenith allegations. Wherever the appropriate limitation, Gale's Zenith allegations were well within the zone of permissible proximity "between [his] original disclosure to the government and the publicly disclosed information for which [Gale] now claims credit as the original source." App. A. 16a. Unlike Barajas (who had no knowledge of the defective damping fluid), Gale had firsthand knowledge of the key fraud common to both PBNEC and Zenith computers manufactured by PBNEC, the commingling with new inventory of used parts from his department's dismantling of used computers. In *Barajas*, even though Barajas was deemed an indirect original source, "[t]he government also conducted a separate and distinct criminal investigation that resulted in the criminal indictment of Northrop." *U.S. ex rel. Barajas v. Northrop*, 897 F. Supp. 1274, 1276 (C.D. Cal. 1995). Here, there was no separate and distinct investigation. Sales of used PBNEC parts to Zenith were "discovered'

(Cont'd)

original source of the key fraud allegation in his ZDS complaint, i.e. that PB was concealing the identity of and comingling used parts in its "new" manufacturing inventory. Other circuits have held that a relator need only be an original source of some of the information on which the complaint is based. *See, e.g., United States ex rel. Merena v. SmithKline Beecham Corp.*, 205 F.3d 97, 103, 107-08 (3d Cir. 2000); *United States ex rel. Fallon v. Acudyne, Corp.*, 97 F.3d 937, 941 (7th Cir. 1996); *Federal Recovery Services, Inc. v. United States*, 72 F.2d 447, 452 (5th Cir. 1995); *United States ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490, 494 n.3 (W.D. Ok. 1997); *United States v. CAC-Ramsay*, 744 F. Supp. 1158, 1160 (S.D. Fl. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992).

Unless the panel overruled rather than "elaborat[e]" *Barajas*, the connection between Gale's disclosures and his Zenith allegations is far closer than the connection between falsified tests and defective damping fluid found acceptable in *Barajas*. Contrary to the panel's suggestion, App. A. 16a-17a, Zenith was not some separate and distinct company, but operated under an alliance agreement under which PBNEC manufactured ZDS brand computers for sale to the government. The fraud in Gale's department was the common element in the sale of both PBNEC and Zenith computers to the government. PBNEC was manufacturing "new" computers under the Zenith brand name using used parts from Gale's computer department.[12] Contrary to the *Barajas* panel's warning, that government could "limit the potential recovery of *qui tam* plaintiffs unfairly simply by

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as part of the routine investigation of Gale's PBNEC allegations. In *Barajas*, the defective damping fluid was discovered during independent tests of the gyroscopes conducted by the government. *Id.*

12. *See, e.g.*, 12/2/96 Defendants' Brief in Support of Settlement at 8:24-25 ("sales relationship between Packard Bell and ZDS under which ZDS sold PCs supplied by Packard Bell to the Government under a contract referred to as 'DTIV'").

initiating a criminal investigation," 5 F.3d at 1411, and its desire to protect and encourage relators, this panel's opinion permits the government to discourage relators much more easily than a public indictment, simply by claiming a broad investigation.

Congress authorized a reduced share, § 3730(d)(1), but did not bar jurisdiction, for relators who are an "original source" for at least some of the information. The conference report explained:

> Once the public disclosure of the information occurs through one of the methods referred to above [in § 3730(e)(4)(A)], then only a person who qualifies as an "original source" may bring the action. A person is an original source if he had some of the information related to the claim which he made available to the government or news media in advance of the false claims being publicly disclosed. This person has the right to bring an action after these disclosures are made public so long as it is filed before an action is commenced by the Government. . . . The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff. In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff.

132 Cong. Rec. H9382, H9389 (Oct. 7, 1986).[13] Thus, read

13. *See also* 132 Cong. Rec. S11238 (Aug. 11, 1986) (Sen. Grassley); *id.* at S15036 (Sept. 24, 1986) (Sen. Grassley); *id.* at S15515 (Oct. 7, 1986) (Sen. Grassley) ("In other words, a 10-percent cap is placed on those "original sources" who bring cases based on information already publicly disclosed where only an insignificant amount of that information stemmed from the original source.").

together as they must be, §§ 3730(e)(4) and 3730(d)(1) provide a sliding scale for Gale's share depending on how much of the information is credited to him as "original source," and cannot be construed to completely bar jurisdiction.

II. Resolution of the Questions is Extremely Important to the Future of the False Claims Act.

A. Giving "Public Disclosure" its Ordinary Meaning Supports the Intent of Congress.

Congress's primary intent in enacting the 1986 FCA amendments was "to enhance the Government's ability to recover losses sustained as a result of fraud against the Government." S. Rep. No. 99-345, at 1 (1986), 1986 U.S.C.C.A.N. 5266, 5266. As for the *qui tam* amendments, Congress's "overall intent" was "to encourage more private enforcement suits." *Id.* at 23-24, 1986 U.S.C.C.A.N. at 5288-89. While avoiding parasitic lawsuits was clearly an additional goal, there is no indication that Congress sought to preclude the disclosure and prosecution of fraud prior to information reaching the general public.

Knowledge by the government (or a private privileged disclosure to Gale) was simply not enough to trigger the jurisdictional bar. First, Congress expressly repudiated the "government knowledge" defense. Second, Congress believed that it was essential for allegations of fraud, and the underlying information, to reach the public domain for reasons of accountability and to act as a check on governmental inaction or under-enforcement.[14] Congress sought to supplement

14. 132 Cong. Rec. H9382, H9389 (conference report) ("The law that we vote on today is intended to encourage a working partnership between both the Government and the qui tam plaintiff. The public will be well served by having more legal resources brought to bear against those who defraud the Government. . . . Another reason for providing for this full party status is to keep pressure on the Government to pursue (Cont'd)

government enforcement with private resources and envisioned a cooperative working relationship.[15] See Gary W. Thompson, A Critical Analysis of Restrictive Interpretations Under the False Claim Act's Public Disclosure Bar, 27 Pub. Cont. L.J. 669, 693 (1998).

The House (Berman) and Senate (Grassley) sponsors recently wrote to Attorney General Reno criticizing restrictive and anti-relator judicial and DOJ constructions of the "public disclosure" and "original source" provisions. They explained, for example, that "by public disclosure, we meant disclosure to the public at large, not just one member of the public and certainly not to a confidential counselor." Congress was concerned with whether the government's information "was sufficiently publicized so that the federal government would be forced to act or explain why it chose not to act." 145 Cong. Rec. E1546 (July 14, 1999).

B. The Panel's Construction of "Public Disclosure" Frustrates the Intent of Congress.

The panel's construction of "public disclosure" undermines Congressional intent by substantially re-enacting the "government knowledge" defense,[16] by discouraging cooperation, and by creating uncertainty and confusion among

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the case in a diligent fashion. Even the United States Government is not without financial limitations. It is not uncommon for Government attorneys to be overworked and underpaid given the demanding tasks and frequently overwhelming case loads they maintain.").

15. S. Rep. No. 345, 99th Cong., 2d Sess. 4, 1986 U.S.C.C.A.N., 5269; 132 Cong. Rec. H9382, H9389 (conference report).

16. As the D.C. Circuit remarked, "when Congress amended the Act in 1986, . . . the focus of the jurisdictional bar [changed] from evidence of fraud inside the government's overcrowded file cabinets to *fraud already exposed in the public domain*." *U.S. ex rel. Findley v. FPC Boron Employees' Club*, 105 F.3d 675, 684 (D.C. Cir. 1997).

relators generally. It is axiomatic that relators will be discouraged from conduct which could trigger a very broad jurisdictional bar, e.g., voluntary disclosures and cooperation in nonpublic investigations. An inadvertent word or question, or the review of even a single "internal" document might suddenly thwart years of relator and attorney time, resources, and effort in investigating and preparing a case. Government agencies could selectively bar relators by simply announcing, privately, an investigation. This would render the "voluntary" disclosure requirement in 3730(e)(4)(B) a potentially deadly and precarious trap for the unsuspecting relator, drastically limiting the class of potential relators to only "original sources."

The government is, in theory, investigating everything. The Gale panel has enacted a wide-open "government investigation" defense, one sought by DOJ in 1992 but rejected by Congress in 1993.[17] Under the panel's construction, there are no bounds as to when an investigation begins and ends, and virtually no limits on documentary and oral contact with the "outside" that could trigger the bar. The advantage of the reasonably precise and objective "public domain" standard is that it is capable of a reasonable degree of retrospective precision. The dates of hearings, filings, reports, and news articles can be determined, years later if need be, with precision. In contrast, the dates of public disclosures allowed by the panel are vague, imprecise, undocumented, and subject to great uncertainty. This case graphically illustrates the problem. Neither the district court, nor the panel, nor ZDS, nor the USAO were able to cite the date and content of oral or documentary disclosures that triggered the bar.

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17. April 1, 1992, Statement of Stuart M. Gerson to House Judiciary Comm., Subcomm. on Civil and Constitutional Rights. The False Claims Amendments Act of 1992 included a jurisdictional bar for ongoing government investigations, but it was never enacted. S. 841, 103d Cong. (1993); § 3(b), H.R. 4563, H.R. Rep. No. 102-837.

The panel's widening of the bar improperly precludes a *qui tam* action anytime the Government made a private and privileged disclosure of the mere existence of an investigation to a cooperating relator. The subversion of the purpose of the FCA by such a tortured construction is especially apparent in this case. Despite proof of both liability and damages, and the inclusion of some ZDS contracts in the original $3.5 million settlement agreement, the USAO has now decided that ZDS is no longer a target. But for this case, therefore, the Government will get nothing from ZDS.

III. The Opinion Conflicts With the Analytical Framework Set Forth by this Court in *Marcus v. Hess*.

The Court has previously rejected the panel's reliance on policy considerations to reject a bona fide relator. The Government argued in *U.S. ex rel. Marcus v. Hess*, 317 U.S. 537, 546-47 (1943), that a relator should not be allowed to base his qui tam complaint on allegations contained in a public criminal indictment. The Court refused to sanction a revision contrary to clear Congressional intent:

> The government presses upon us strong arguments of policy against the statutory plan, but the entire force of these considerations is directed solely at what the government thinks Congress should have done rather than at what it did. It is said that effective law enforcement requires that control of litigation be left to the Attorney General; that divided control is against the public interest; that the Attorney General might believe that war interests would be injured by filing suits such as this; that permission to outsiders to sue might bring unseemly races for the opportunity of profiting from the government's investigations; and finally that conditions have changed since the Act was passed in 1863. But the trouble with these arguments is that they are

> addressed to the wrong forum. Conditions may have changed, but the statute has not.

Id. at 546-47. *See Dunn v. CTFC*, 519 U.S. 465 (1997) (plain statutory language trumps policy considerations). By ignoring the plain language of the statute and interjecting improper policy considerations and speculation, App. 10a-11a, the panel improperly departed from this analytical framework. For example, the panel, relying on "one of the policy goals" behind the 1986 amendments, and speculating that the exclusive list of three public disclosure fora in § 3730(e)(4)(A) was "somewhat ambiguous," because it supposedly produces an "absurd result," the panel expanded the expressly limited bar to cover "any kind of government investigation" or "any other kind." Such a statutory rewrite is analytically improper under the objective "plain meaning" standard employed by the Court. First, nothing is "ambiguous" about the exclusive listing of public disclosure fora. Second, Congress would have introduced the list in § 3730(e)(4)(A) with "for example" if it had intended "any kind" of Government investigation.[18] Third, the Government didn't learn about ZDS fraud from its "own" investigation, but from a logical outgrowth of the statutory investigation of the PBNEC fraud initiated by Gale's complaint. Finally, the "policy" analysis simply ignored the provision of the FCA, § 3730(d)(1), allowing Gale to remain a relator (assuming, *arguendo*, a qualifying public disclosure) so long he possessed some "original source" information (here the PBNEC comingling of used with new parts ultimately assembled into ZDS computers).

The panel's next policy-driven detour (App. A. 14a) was to rely on Congress' supposed intent to ban "free riders" on Government information to conclude that the USAO disclosures to Gale were "public" to trigger the bar, but only as to him.

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18. If "any kind" of Government investigation could bar a relator's action, then the Government would not be required to file suit as provided in § 3730(b)(3).

This analysis turns the 1986 repudiation of the "government knowledge" defense on its head.[19] Congress rewrote the bar to focus on what the public–not the Government–knows, and it is undisputed that the "public" knew nothing of the ZDS fraud. Virtually every relator uses some information ultimately gleaned from Government files. Congress triggered the bar only by disclosures to the general public, i.e. it is the method and scope of the disclosure that matters, not the presence of information in the minds of AUSAs and in their files. Finally, even if a public disclosure occurred, for example, if the USAO announced the ZDS investigation in a press release, Gale's "original source" status is preserved because the statute asks what Gale provided the Government (PBNEC's comingling of used with new parts) rather than what the Government provided him (expanding the PBNEC investigation to include ZDS computers manufactured by PBNEC).

The panel's final departure from the statute was its invention of a "new entity" limitation on Gale's "original source" status. App. A. 16a-17a. The FCA contains no such restriction, and the panel ignores the provision in § 3730(A) that Gale need only be "an" original source, thus contemplating that there may be other sources of information (e.g., Compaq). Gale was "an" original source for the PBNEC "used parts" scheme, a core and essential element of the ZDS complaint, his use of some arguably publicly disclosed information cannot defeat jurisdiction (although it may affect share) whether the existing PBNEC complaint had been simply amended to add it's sister company, ZDS, or whether, as here, Gale filed a new complaint for sound tactical and strategic reasons.

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19. The panel's construction would make the "government knowledge" defense to certain actions barred under § 3730(e)(2) surpuflous.

CONCLUSION

This petition for a writ of certiorari should be granted for the reasons set forth above.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DATED AND FILED JULY 5, 2001

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 98-56447
D.C. No. CV-96-02728-GHK-CTx

SEAL 1; SEAL 2,

Plaintiffs-Appellants,

v.

SEAL A,

Defendant-Appellee.

Appeal from the United States District Court
for the Central District of California
George H. King, District Judge, Presiding

Argued and Submitted
September 12, 2000 — Pasadena, California

Filed July 5, 2001

Before: Harry Pregerson, William A. Fletcher, and
Ronald M. Gould, Circuit Judges.

Opinion by Judge William A. Fletcher

* * *

Appendix A

OPINION

W. FLETCHER, Circuit Judge:

Appellant Abraham Gale ("Gale") worked for ten weeks for Packard-Bell NEC, Inc. ("PBNEC"). After being fired by PBNEC, Gale filed a qui tam action against that company under the False Claims Act ("FCA"), 31 U.S.C. §§ 3729-3733, alleging that it had committed fraud by selling computers to the government as new even though they contained used parts. The government declined to intervene in Gale's FCA suit, but nonetheless initiated criminal and civil investigations into PBNEC's allegedly fraudulent practices. The United States Attorney allowed Gale to review documents obtained during at least one of those investigations, as well as during its investigation into one of PBNEC's then-competitors, Appellee Zenith Data Systems, Inc. ("Zenith"). After learning from the government documents he saw in the office of the United States Attorney, as well as from oral disclosures by government attorneys in that office, that Zenith was probably involved in the same type of fraud as PBNEC, Gale filed a separate FCA action against Zenith. The government, PBNEC, and Zenith subsequently reached a proposed settlement to which Gale objected. After an evidentiary hearing, the district court held that it did not have jurisdiction over Gale's FCA action against Zenith and dismissed the complaint. Gale appeals that dismissal.

We agree with the district court that it lacked jurisdiction over Gale's Zenith action, and we affirm.

Appendix A

I

Gale was employed for ten weeks by PBNEC as Manager of the Computer Department. He was fired during his probationary period, in December 1994. Three months later, Gale wrote a letter to the government alleging that PBNEC had committed fraud against the government. PBNEC sold to the government computers that it claimed were new and for which it charged new-computer prices. Gale alleged that in fact those computers contained used parts. Gale mentioned only PBNEC in his letter. He made no mention of Zenith, a company that had an "alliance agreement" or "joint manufacturing agreement" with PBNEC during 1994 and 1995.[1]

Gale filed a qui tam complaint under the FCA against PBNEC in April 1995. Although the government investigated PBNEC and proposed a settlement, it never intervened in Gale's action. At about the time Gale filed his FCA complaint against PBNEC, Compaq Computer Corporation ("Compaq") sued PBNEC, claiming unfair competition due to PBNEC's alleged practice of selling computers with used parts as new. During discovery in its suit, Compaq questioned PBNEC witnesses about the relationship between PBNEC and Zenith. In August and September 1995, the United States Attorney's Office ("USAO") discussed the government's PBNEC investigation with lawyers for Compaq, and in September the USAO initiated an investigation of Zenith. The Air Force Office of Special Investigation ("OSI") also launched an investigation of Zenith at the request of the USAO. In the

1. Zenith became a wholly-owned subsidiary of PBNEC in April 1996, and a division of PBNEC in 1997.

course of these investigations, the USAO obtained a substantial amount of information about Zenith's sales practices.

Although Gale was not an active participant in the PBNEC investigations, the USAO allowed him to examine documents that it had obtained. From January through May 1996, Gale reviewed PBNEC documents that government lawyers had obtained through a Department of Defense subpoena issued to PBNEC. Those documents contained information raising the possibility that Zenith had committed fraud on the government similar to that committed by PBNEC. Government lawyers state that they also orally informed Gale that there was a possibility that some Zenith computers sold to the government had contained used PBNEC parts.

In April 1996, Gale filed a separate qui tam action under the False Claims Act, this time against Zenith. In October 1996, the government, PBNEC, and Zenith proposed a settlement, to which Gale objected, that would have disposed of both cases. Zenith asserts that Gale demanded an $8 million payment in return for his agreement to the settlement, and that the other parties refused this offer.

In March 1998, the district court held that it had jurisdiction over Gale's FCA case against PBNEC, and it held an evidentiary hearing to determine whether it had jurisdiction over his case against Zenith. Gale maintained in the district court that he had first seen the documents he had reviewed in the United States Attorney's Office during his employment at PBNEC, and that the government had needed

his help to make sense of the information they contained. The district court found that Gale was not credible. Among other things, it found that "Mr. Gale did not know about the alleged Zenith fraud until he started to review documents at the United States Attorney's Office . . . ." "Overall, it is clear to this court that even if some form of Zenith fraud did occur, Mr. Gale was not aware of it from his experiences at Packard Bell." "Mr. Gale did not learn about the alleged Zenith fraud from any independent investigation he conducted after his employment at Packard Bell but prior to his review of documents at the U.S. Attorney's Office."

The district court held that "the government's disclosure to Mr. Gale of documents and information in the Packard Bell case which contained 'allegations or transactions' about the Zenith fraud was a 'public disclosure' pursuant to 31 U.S.C. § 3730(e)(4)(A)." It further held that Gale was not an "original source" of the information within the meaning of 31 U.S.C. § 3730(e)(4)(A), and under our holding in *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993). It then dismissed Gale's FCA suit against Zenith, holding that it lacked jurisdiction over the case.

The government settled Gale's FCA suit against PBNEC for $3.5 million, and Gale recovered a relator's share of fifteen percent of that settlement. Gale appeals the dismissal of his FCA suit against Zenith.

II

The False Claims Act is a tool to fight fraud on the government. Under the FCA, the government or a private

party may bring a civil action against a party allegedly committing such fraud. 31 U.S.C. §§ 3730(a), (b). The qui tam provisions of the statute-those pertaining to private parties-provide incentives for insiders with knowledge of fraud on the government to come forward with that knowledge. 31 U.S.C. § 3730(d). If a private party brings a qui tam action, she does so as a "relator," on behalf of the government, which may choose to intervene in the action. If the relator is successful, she is entitled to a share of the recovery, whether or not the government intervenes. 31 U.S.C. §§ 3730(d)(1), (2).

The compensation available to relators, however, encourages parasitic lawsuits in which those with no independent knowledge of fraud use information already available to the government to reap rewards for themselves without exposing any previously unknown fraud. The FCA reflects Congress' attempt to find " 'the golden mean between adequate incentives for whistle-blowing insiders with genuinely valuable information and discouragement of opportunistic plaintiffs who have no significant information to contribute of their own.' " *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)).

In earlier versions of the FCA, the statute was abused by qui tam suits brought by private plaintiffs who had no independent knowledge of fraud. *See, e.g., United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Marcus*, the Supreme Court held that a private plaintiff might bring a qui tam action under the FCA, as it then existed, even though

his knowledge of fraud was gained from a government criminal indictment. *Id.* at 546. In reaction to *Marcus*, Congress amended the FCA in 1943 to bar jurisdiction over qui tam suits that were "based on evidence or information the government had when the action was brought." 31 U.S.C. § 3730(b)(4) (1982) (superseded). This amendment led to unintended consequences, however, as it deprived courts of jurisdiction over suits in which the would-be relators had given their information to the government before filing their claims. *See, e.g., United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100, 1106 (7th Cir. 1984).

Congress amended the FCA in 1986 to its current form in an attempt to achieve the proper balance. The relevant text provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government

> before filing an action under this section which is based on the information.

31 U.S.C. §§ 3730(e)(4)(A), (B). The analysis under this provision is divided into two steps. First, the court must determine whether, at the time the complaint was filed, there has been a "public disclosure" of the "allegations or transactions" on which the claim is based. 31 U.S.C. § 3730(e)(4)(A). If the allegations or transactions were not publicly disclosed, the court has subject matter jurisdiction even if the relator was not the original source of the information. *United States ex rel. Wang v. FMC Corp.*, 975 F.2d 1412, 1419-20 (9th Cir. 1992). Second, if the allegations or transactions were publicly disclosed, the relator may bring the suit only if she was "an original source of the information." 31 U.S.C. § 3730(e)(4)(A); *Barajas*, 5 F.3d at 411.

III

A. Public Disclosure

There are two aspects to public disclosure under § 3730(e)(4)(A). First, the disclosure must have been through a method specified in the statute. Second, the disclosure must have been "public" within the meaning of the statute.

1. "Investigation"

Section 3730(e)(4)(A) sets forth a list of methods for making a "public disclosure" of allegations or transactions. The disclosures may be "in a criminal, civil, or administrative

hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or *investigation*, or from the news media . . . ." 31 U.S.C. § 3730(e)(4)(A) (emphasis added). This court has not yet decided whether that list is exhaustive, but most other circuits to consider the question have concluded that it is. *See Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 870 (4th Cir. 1999); *United States ex rel. Dunleavy v. County of Delaware*, 123 F.3d 734, 744 (3d Cir. 1997); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 323 (2d Cir. 1992); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17, 20 (1st Cir. 1990). The Tenth Circuit, however, has found that the list is not exhaustive:

> [T]his court rejected the argument that the disclosure itself must be through one of the listed sources in section 3730(e)(4)(A). Instead, in order for the jurisdictional bar to apply, the allegations of fraud or fraudulent transactions must be contained in one of the forms, or be available from one of the *sources*, listed in [that] section . . . . That section defines the sources of allegations and transactions which trigger the bar but it does not define the only *means* by which public disclosure can occur.

United States ex rel. Fine v. Advanced Sciences, Inc., 99 F.3d 1000, 1004 (10th Cir. 1996) (emphasis in original) (internal citations omitted). In light of our reading of § 3730(e)(4)(A), we do not need to decide whether the list is exhaustive.

We must decide in this case whether the investigations undertaken by the government, and disclosed to Gale, are "investigation[s]" within the meaning of § 3730(e)(4)(A). It is common to refer to investigations under this section as "administrative investigations." *See, e.g.*, *United States ex rel. Aflatooni v. Kitsap Physicians Services*, 163 F.3d 516, 524 (9th Cir. 1999); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416, 1419 (9th Cir. 1991). It is clear that administrative investigations are included within the term. But we see no reason, based on either the text or on any policy behind it, to limit the term to a particular kind of government investigation.

We read the term "investigation" in the context of Congress' purposes in amending the FCA in 1986. One of the policy goals behind the amendments was to "reject[ ] suits [that] the government is capable of pursuing itself, while promoting those [that] the government is not equipped to bring on its own." *Springfield Terminal Ry. Co.*, 14 F.3d at 651. We have stated that "[t]he 1986 amendments also reflected Congress's recognition that the government simply lacks the resources to prosecute all viable claims, even when it knows of fraudulent conduct." *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512, 1519 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939 (1997). In construing § 3730(e)(4)(A), we have emphasized the statute's purpose of assisting the government:

> Under § 3730(e)(4)(A), if the allegations were not previously disclosed to the public, the relator's complaint benefits the government, and the relator is rewarded without inquiring into the details of

> how the relator obtained the information. If, on the other hand, the allegations in the complaint do not benefit the government because the government already knew about them, then § 3730(e)(4)(A) bars jurisdiction unless the second policy is furthered, that is, an insider provided information to the government who was under no duty to do so.

United States ex rel. Biddle v. Board of Trs. of Stanford Univ., 161 F.3d 533, 539 (9th Cir. 1998); *see also Aflatooni*, 163 F.3d at 521-22 & n.8.

The relevant portion of the text provides that the disclosure may be "in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation . . . ." 31 U.S.C. § 3730(e)(4)(A). It is a truism that *statutory interpretation begins with the plain meaning of the statute's language. United States v. Alvarez-Sanchez*, 511 U.S. 350, 356 (1994). " 'If a legislative purpose is expressed in plain and unambiguous language, . . . the . . . duty of the courts is to give it effect according to its terms. Exceptions to clearly delineated statutes will be implied only where essential to prevent absurd results or consequences obviously at variance with the policy of the enactment as a whole.' " *United States ex rel. Lujan v. Hughes Aircraft Co.*, 243 F.3d 1181, 1187 (9th Cir. 2001) (alteration in original) (quoting *United States v. Rutherford*, 442 U.S. 544, 551-52 (1979)).

We find the language of this provision somewhat ambiguous. We further find that one plausible reading of the

phrase at issue — that "congressional," "administrative," and "Government Accounting Office" all modify (and therefore limit) all four of the nouns that follow, including "investigation" — produces, in Gale's case, an absurd result. Congress' intent in amending the FCA in 1986 is quite clear, and allowing Gale to bring an FCA claim based on information given directly to him by the government during the government's own investigation is obviously not what Congress intended. The purpose of this provision of the FCA is to prevent someone like Gale, who has information only because he obtained it from the government, from profiting from that information and thereby diminishing the government's recovery from the defrauder. Whether a government investigation is criminal, civil, administrative, or some other kind should not make any difference.

We conclude, therefore, that the term "investigation," as used in § 3730(e)(4)(A), must encompass any kind of government investigation — civil, criminal, administrative, or any other kind. The district court's findings of fact make clear that the information upon which Gale's FCA complaint is based was obtained by him from investigations conducted by the government. The question then becomes whether the information from the investigations was publicly disclosed within the meaning of § 3730(e)(4)(A) when Gale was shown documents from the investigations and told about the information learned in them.

2. "Public"

We must decide whether Gale, in the circumstances of this case, is a member of the "public" within the meaning of

"public disclosure" under § 3730(e)(4)(A). We have previously indicated that a government employee to whom information relevant to an FCA action is disclosed is not a member of the public under this section. *See Hagood*, 929 F.2d at 1419; *see also Schumer*, 63 F.3d at 1518, *vacated on other grounds*, 520 U.S. 939 (1997). We have also rejected, in *Schumer*, 63 F.3d at 1519, a Second Circuit decision holding that employees of a corporation later sued under the FCA were members of the public for purposes of that suit. *See Doe*, 960 F.2d at 323. The Second Circuit held in *Doe* that federal investigators who had informed employees of the defendant corporation, at their place of work, that the government was investigating allegations against the corporation had made a "public disclosure" of those allegations. *Id.* at 322-23. In *Schumer*, we rejected the Second Circuit's rule. In our view, such an action is not public disclosure. "Because the employee has a strong economic incentive to protect the information from outsiders, revelation of information to an employee does not trigger the potential for corrective action presented by other forms of disclosure." *Schumer*, 63 F.3d at 1518. Further, the rule adopted by the Second Circuit in *Doe* "would run contrary to [the] purpose [of the FCA], for it drastically curtails the ability of insiders to bring suit once the government becomes involved in the matter." *Id.* at 1519.

In contrast to the private individuals in *Hagood* and *Doe*, Gale was an outsider to the Zenith investigation at the time he received the information in the United States Attorney's Office. Moreover, he had significant incentive (and no disincentive) to use allegations of fraud by Zenith to his own advantage. Holding that Gale is a member of the public for

purposes of the Zenith investigation and any subsequent FCA suit against Zenith is consistent with Congress' intent that the FCA not be used by people attempting to "free ride" on information obtained from the government. Gale signed a "Declaration" requiring him to keep confidential the information he obtained from the USAO, but this does not undermine our conclusion that Gale is a member of the public for purposes of his suit against Zenith. Disclosure of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure. It may not be public disclosure as to some other member of the public who independently comes upon information already possessed by the government and disclosed to a person like Gale, and who then files an FCA action based on the information independently obtained. But it is public, as to Gale, in the sense necessary to the sensible operation of § 3730(e)(4)(A). Because it was disclosed to an outsider to the investigation who now seeks to profit from it as an FCA relator, it was publicly disclosed to that person.

B. Original Source

Because the information underlying Gale's suit was publicly disclosed to Gale under § 3730(e)(4)(A) before he filed his Zenith complaint, we must determine whether he was an "original source" of that information. If so, there is no jurisdictional bar to Gale's action despite the public disclosure. Section 3730(e)(4)(B) defines an "original source" as "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the

Government before filing an action under this section which is based on the information." 31 U.S.C. § 3730(e)(4)(B).

We construed this provision of the FCA in *Barajas*, holding that a person is an "original source" of publicly disclosed information if the person's original disclosure "triggered" the investigation that led to the publicly disclosed information. *Barajas*, 5 F.3d at 411. Although the relator in *Barajas* had not known of the later allegations before the government discovered them, we held that he could nonetheless be deemed an original source of them. We set forth the following test:

> Barajas is "an original source" with respect to the proposed amendments if he (1) has some direct and independent knowledge of information on which the proposed amendments are based, and (2) voluntarily disclosed that information to the government before filing the original complaint. . . . Barajas is "an original source" with respect to a proposed amendment if he played some part, whether direct or indirect, in the public disclosure of the allegations that are the subject of the proposed amendments. The answer to this inquiry depends on the facts and circumstances of the individual case, evaluated in light of the central purpose of the Act to encourage persons with knowledge of fraud against the government to come forward with their knowledge.

Barajas, 5 F.3d at 411 (internal citations omitted). In *Barajas*, we did not specify how far the test should be extended; that

is, we did not specify the proximity that is required between the relator's original disclosure to the government and the publicly disclosed information for which she now claims credit as an original source. If we extended the test to allow a relator to bring a claim based on any information obtained in an investigation, no matter how distantly linked to the relator's original claim, we would extend the "original source" exception to the public disclosure rule beyond what Congress intended.

The question before us, therefore, is how close the connection must be between the relator's original disclosure to the government and the allegations that later form the basis for her FCA action. In order to answer that question, we provide the following elaboration of the *Barajas* test. In determining whether a relator is the original source of information discovered in an investigation triggered by her initial disclosures, the district court should consider (1) the degree to which the relator's information helped uncover the later allegations; (2) the degree to which other private actors helped uncover those allegations; (3) the degree to which the government played a role in uncovering those allegations; and (4) whether the later allegations are brought against the same entity as the earlier allegations. If the FCA relator brings suit against a new entity, the relator will not ordinarily be considered an original source of the later allegations against that new entity.

It is undisputed that Gale was the original source of information about alleged fraud at PBNEC, and that Gale's information prompted the government to initiate an investigation into that company. Gale's information about

PBNEC did not include Zenith, and the district court found not credible his statements that he had learned about alleged fraud at Zenith while employed by PBNEC. The government initiated an investigation into Zenith after discussing its PBNEC investigation with Compaq, a competitor that had independently filed suit against PBNEC, and after learning from Compaq of Zenith's potential fraud. Gale's disclosures thus started the government on the trail that eventually led to Zenith's alleged fraud, but others provided substantial assistance to the government along the way. The government also played a significant role in uncovering the allegations regarding Zenith. At least two government agencies performed investigations of Zenith. Gale played no active role in any government investigation, and Gale obtained his information about Zenith from the government. Finally, when the later allegations were brought against Zenith, it was a separate company from PBNEC, the company named by Gale in his original disclosure.

We hold that, in these circumstances, Gale played an insufficient role in uncovering the later allegations to be deemed an original source.

CONCLUSION

We hold that there was "public disclosure" to Gale of the "allegations or transactions" involving Zenith within the meaning of § 3730(e)(4)(A), and that Gale was not an "original source" of that information within the meaning of § 3730(e)(4)(B). The decision of the district court is therefore AFFIRMED.

APPENDIX B — ORDER UNDER SEAL OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA FILED AUGUST 5, 1998

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 96-2728-GHK (Mcx)

UNITED STATES OF AMERICA, *ex rel.*,
[UNDER SEAL]

Plaintiff,

vs.

[UNDER SEAL]

Defendants.

ORDER

UNDER SEAL

This matter is before the court to determine whether the court has subject matter jurisdiction in the Zenith Data Systems case (CV 96-2728). The court has fully considered the briefs, supporting papers, oral argument, and evidence presented at the hearings pertaining to this matter. We rule as follows:

Appendix B

Findings of Fact

We have reviewed the evidence presented by the parties pertaining to the court's subject matter jurisdiction over the lawsuit filed against Zenith Data Systems ("Zenith") by qui tam plaintiff Abraham Gale ("Gale") on April 16, 1996 pursuant to the qui tam provisions of the False Claims Act, 31 U.S.C. § 3729 *et. seq.* ("FCA"). We have also observed the demeanor and manner of the witnesses who testified at the hearings held on April 20; 1998, April 21, 1998, and May 1, 1998. Based on our review of the evidence and our observation of the witnesses, we find as follows:

(1) Mr. Gale did not know about the alleged Zenith fraud until he started to review documents at the United States Attorney's Office sometime in January, 1996.

(2) Mr. Gale did not mention Zenith in his meetings with government attorneys and investigators on April 7, 1995 and June 1, 1995. We choose to credit the testimony of Government witnesses including Special Agent Martin, Special Agent Phillips, AUSA Hershman and AUSA Woodhead, some of whom testified that Gale did not mention Zenith at these meetings and some of whom testified that they could not recall whether he had mentioned Zenith.

(3) Mr. Gale told S.A. Phillips at the June 1, 1995 meeting that the only computers that came in for refurbishment at Packard Bell were Packard Bell branded computers. *See* Hearing Exhibit 1, at 5.[1]

1. "SPECIAL AGENT PHILLIPS: All the computers that came in for refurbishment were Packard Bell, no other brands?" "MR. GALE: Right." Hearing Ex. 1 at 5.

(4) The colored illustration Mr. Gale provided at the June 1, 1995 meeting does not mention Zenith. Hearing Ex. 8.

(5) Prior to filing the Packard Bell Complaint, Mr. Gale's counsel, Mr. Bellone, had no knowledge of Zenith. *See* R.T. 4/20/98 at 45:8-46:6.

(6) In the Packard Bell complaint, Mr. Gale sued not only Packard Bell, but also four individual defendants. However, Mr. Gale did not mention Zenith in the Packard Bell complaint. Packard Bell Complaint, Hearing Exhibit 5.

(7) Mr. Gale was not allowed to take home documents from Packard Bell. R.T. 4/21/98 at 67:8-14. Packard Bell is a secretive company. R.T. 4/21/98 at 79:3-13. Accordingly, it is unlikely that Packard Bell wanted him to learn about its entire company and therefore allowed him to review 10,000 documents (R.T. 5/1/98 at 16:8-12) at the company during his less than ten weeks of employment. Mr. Gale's testimony on this point is not credible. In light of the foregoing, we find that Mr. Gale did not learn about the alleged Zenith fraud from his review of documents while employed at Packard Bell.

(8) Similarly, Mr. Gale did not learn about the alleged Zenith fraud from his experiences at Packard Bell. Mr. Gale's testimony regarding his experiences at Packard Bell relating to the alleged Zenith fraud is contradicted by testimony from other witnesses who are more credible as well as other evidence which tends to show that Mr. Gale did not know about the alleged Zenith fraud from his

experiences at Packard Bell. For example, Mr. Gale specifically relies on a Daily Production Report he allegedly filled out every day which contained a line for a Zenith brand computer (the "P8410"). *See* Hearing Ex. 2. However, other testimony shows that the only fully assembled computers that Packard Bell sold to Zenith were the Zenith Education Series model and a few pre-production units. R.T. 4/21/98 at 136:17-22, 179:1-21. The PB410 referenced in the Daily Production Report represents this ES model that was not sold to the government. R.T., 24 4/21/98 at 136:23-25, 137:1-3, 137:9-14. In addition, Mr. Gale testified that Zenith computer component parts (riser boards, CPUs and old model Packard Bell keyboards) were sent to a facility called "ZDS Westlake." R.T., 4/21/98 at 62:5-67:7. However, Mr. Gale never mentioned these specific components or "ZDS Westlake" in any of the key documents he submitted to the government in his Packard Bell and Zenith qui tam actions, including his written disclosure of relator in the Zenith case. Furthermore, prior to filing the qui tam action against Zenith, Mr. Gale never told the government that he had any personal knowledge of Zenith.[2] Mr. Gale's failure to mention his alleged "personal knowledge" of Zenith fraud prior to filing the Zenith action raises an inference that Mr. Gale probably did not know about the alleged fraud from his experiences at Packard Bell but rather first learned about the alleged Zenith fraud from his review of documents at the U.S. Attorney's Office. Other inconsistencies in Mr. Gale's testimony abound. We find that Mr. Gale's testimony is not credible. In addition,

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2. We believe AUSA Hershman's testimony that the first time Mr. Gale mentioned to her that he had personal knowledge of Zenith was on May 23, 1996. Hershman 7/21/97 Decl., ¶ 7; R.T. 4/21/98 at 153:7-18. We also rely on our findings 2-6, *supra*.

Mr. Gale's corroborating witness, Benita Lorenzana, is not credible. She recanted at least part of her declaration at her deposition. Overall, it is clear to this court that even if some form of Zenith fraud did occur, Mr. Gale was not aware of it from his experiences at Packard Bell.[3]

(9) Mr. Gale did not learn about the alleged Zenith fraud from any independent investigation he conducted after his employment at Packard Bell but prior to his review of documents at the U.S. Attorney's Office. Mr. Gale testified that after he left Packard Bell and before he sued Zenith, he discovered (1) the Desktop IV contract, (2) the Desktop V contract, (3) a contract in which ZDS computers were sold to the Army Engineering corps and (4) sales by Zenith to the Army. R.T. 4/21/98 at 79:14-81:22, 82:16-83:4. However, Mr. Gale mentioned none of these contracts and sales in either his Zenith Complaint or his Written Disclosure of Relator filed in the Zenith case. Zenith Complaint, Hearing Ex. 6; Written Disclosure of Relator, Hearing Ex. 7. We find Mr. Gale's testimony on this point not credible.

(10) Beginning in August 1995, AUSA Hershman had conversations with counsel for Compaq Computer Corporation.

(11) AUSA Hershman contacted counsel for Compaq because she knew that Compaq had sued Packard Bell and

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3. We need not decide whether Zenith actually committed any fraud. Rather, we decide only that Mr. Gale did not know about any alleged Zenith fraud from his experiences at Packard Bell and only learned about that alleged fraud while reviewing documents at the U.S. Attorney's Office.

she thought that Compaq could have some useful information regarding Packard Bell. R.T. 4/20/98 at 27:1-29:22.

(12) In the course of discussions with counsel for Compaq, Compaq counsel mentioned that Zenith had a very large contract with the government called the Desktop IV contract that involved the sale of desktops to the government. R.T. 4/20/98 at 25:25-26:10, 26:13-25, 31:22-32:7; R.T. 4/21/98 at 12:24-13:8, 15:15-16:15. After those conversations with Compaq counsel, AUSA Hershman decided it was worthwhile to look at ZDS. R.T. 4/21/98 at 13:3-8.

(13) In September, 1995, AUSA Hershman launched an investigation of Zenith to determine whether Zenith had sold or provided to the government, as new computers, computers containing used components. R.T. 4/20/98 at 25:10-16; R.T., 4/21/98 at 12:19-23.

Conclusions of Law

(1) Qui tam plaintiff Gale bears the burden of establishing subject matter jurisdiction. *U.S. ex rel. Barajas v. Northrom Corp.*, 5 F.3d 407, 409 (9th Cir. 1993) (citing *Farmers Ins. Exch. v. Portage La Prairie Mut. Ins. Co.*, 907 F.2d 911, 912 (9th Cir. 1990)).

(2) Because we have found that, as a matter of fact, Mr. Gale did not know about the Zenith fraud from his experiences at Packard Bell, from his review of documents at Packard Bell or from any independent investigation conducted by Mr. Gale, the government's disclosure to Mr. Gale of documents and information in the Packard Bell

case which contained "allegations or transactions" about the Zenith fraud was a "public disclosure" pursuant to 31 U.S.C. § 3730(e)(4)(A).[4] The concerns outlined in *U.S. ex rel Schumer v. Hucthes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds*, 520 U.S. 939, 117 S. Ct. 1871 (1997), are inapplicable here. In *Schumer*, the Ninth Circuit stated that disclosure to company employees should not constitute a public disclosure because this would curtail the ability of insiders to bring suit once the government becomes involved in a matter. *Id.* at 1519. However, Gale was never an employee of Zenith and was not an "insider" who was otherwise involved in or knew about the Zenith fraud before the Government disclosed it to him.[5] Rather,

4. See also our discussion of *Barajas, infra*. Although not fully addressed by the parties, we find that the other factors in the public disclosure test have been met. The allegations were disclosed in the manner delineated in section 3730 (e) (4) (A) because they took place in the course of an investigation with administrative components, including investigation by the OSI. *See U.S. ex rel. Doe v. John Doe Corn.*, 960 F.2d 318, 323 (2d Cir. 1992). In addition, the relator's action is "based upon" the public disclosure because it merely repeats and reuses information that was publicly disclosed to him during the course of the investigation.

5. In *U.S. ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992) and *U.S. ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996), the courts expressed a similar concern with protecting insiders by defining public disclosure as occurring when allegations are disclosed to any member of the public not previously informed thereof. The *Doe* court determined that employees of the investigated company who were "strangers to the fraud" (i.e., who knew nothing about the allegedly fraudulent scheme) qualify as members of the public with no prior knowledge, such that disclosure

(Cont'd)

Gale was like a member of the public vis-a-vis the Zenith fraud inasmuch as he never worked for Zenith and knew nothing about Zenith fraud from his experiences at Packard Bell.

(3) Mr. Gale was not an "original source" pursuant to 31 U.S.C. § 3730(e)(4)(A) because (a) he had no direct and independent knowledge of information on which the Zenith complaint was based as a result of his experiences (or document review) at Packard Bell or his subsequent independent investigation of Zenith contracts with the government and (b) because *Barajas* does not apply. *See* discussion of *Barajas*, *infra*.

(4) The rule outlined in *U.S. ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), *cert. denied*, 511 U.S. 1033 (1994), does not apply to the facts of this case. In *Barajas*, the Ninth Circuit outlined several possible standards for determining whether there has been a "public disclosure" and, if so, whether the qui tam plaintiff is an "original source" under the FCA. The Ninth Circuit focused on whether the information supplied by the qui tam plaintiff "triggered," "influenced," "instigated," or "caused," the investigation that, in turn, led to the allegations. Each permutation of the *Barajas* test seems to require a certain

(Cont'd)
to them constitutes a "public disclosure." The Ninth Circuit in *Schumer* specifically criticized the *Doe* court's application of the public disclosure bar to company employees who were strangers to the fraud. This criticism is irrelevant for our purposes because we conclude that even under the standards set forth in *Schumer*, the government's disclosure to Mr. Gale constituted a public disclosure for purposes of the FCA.

level of "directness" between the information supplied by the qui tam plaintiff and the resulting allegations. In *Barajas*, the qui tam plaintiff had provided information to the government about a specific test the results of which he claimed were being falsified, and that information led the government to perform tests on that piece of equipment. Those tests, in turn, led the government to discover the additional fraud. Here, by contrast, the only connection between Gale's Packard Bell allegations and the resulting allegations against Zenith is that during the course of generally investigating Packard Bell, AUSA Hershman came across information regarding possible Zenith fraud.

We decline to extend *Barajas* to cover such a tenuous connection between the information provided to the government about one company (Packard Bell) and the resulting allegations against another, separate company (Zenith).[6] To extend *Barajas* in the manner suggested by Mr. Gale would allow a qui tam plaintiff to file additional qui tam suits against new defendants based on information somehow obtained as a result of investigations into the original qui tam complaint even if that information involves a completely different company, different contracts, different practices, etc. This interpretation would seem to invite the very parasitic and opportunistic lawsuits Congress sought to

6. Another distinction between the facts of *Barajas* and those of our case is that in *Barajas*, the qui tam plaintiff was merely seeking to amend the complaint to add additional allegations against the same defendant based on information uncovered as a result of the government's investigation of that case. Here, by contrast, Mr. Gale is seeking to establish jurisdiction over an entirely new case filed against a separate defendant.

preclude when it enacted the jurisdictional bar. In addition, this interpretation does not comport with Congress' intent to enlist the cooperation of individuals who are either close observers or otherwise involved in the fraudulent activity. *See U.S. ex rel. Devlin v. State of California*, 84 F.3d 358, 362 (9th Cir.), *cert. denied*, 117 S.Ct. 361 (1996). While the qui tam plaintiff in *Barajas* would qualify as a "close observer" or "otherwise involved in the fraudulent activity," based on our factual findings outlined above, Mr. Gale would not vis-a-vis the alleged Zenith fraud.[7]

Furthermore, Mr. Gale's interpretation of *Barajas* would reduce subject matter jurisdiction under the FCA to what amounts to a "but for" test. Under such a test, there would be subject matter jurisdiction anytime a qui tam plaintiff could demonstrate that "but for" the information provided to the government, the government would not have discovered some additional fraud, however unrelated to the original fraud reported. We decline to adopt such a "but for" test because it is contrary to the various standards set forth even in *Barajas*.

(5) In light of the foregoing, this court does not have subject matter jurisdiction over the Zenith case (CV 96-2728). This case shall be dismissed forthwith.

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7. Even if some of the information regarding the alleged Zenith fraud resulted from the Civil Investigative Demands served upon Packard Bell, this still would not be sufficient to confer relator status in the Zenith case on Mr. Gale. Based on our findings outlined above, Mr. Gale simply was not a "close observer" or "otherwise involved in the fraudulent activity" with regard to the alleged Zenith fraud.

IT IS SO ORDERED.

Dated: This 4th day of August, 1998

s/ George H. King
GEORGE H. KING
United States District Judge

Appendix B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NO. CV 96-2728 GHK (Mcx)

UNITED STATES OF AMERICA, *ex rel.*,
[UNDER SEAL]

Plaintiff,

vs.

[UNDER SEAL],

Defendants.

On August 4, 1998, after extensive evidentiary hearings, this court determined that we lacked subject matter jurisdiction over plaintiff's complaint.

Accordingly, pursuant to said August 4, 1998, order, it is hereby ADJUDGED, DECREED AND ORDERED that this action is dismissed for lack of subject matter jurisdiction.

IT IS SO ORDERED.

Dated: This 4th day of August, 1998.

s/ George H. King
GEORGE H. KING
United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED SEPTEMBER 18, 2001

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NO. 98-56447

D.C. No. CV-96-02728-GHK-CTx

SEAL 1; SEAL 2,

Plaintiffs-Appellants,

v.

SEAL A,

Defendant-Appellee.

ORDER

Before: PREGERSON, W. FLETCHER, and GOULD, Circuit Judges.

The panel has voted to deny the petition for rehearing and to deny the petition for rehearing en banc, filed August 21, 2001.

Appendix C

The full court has been advised of the petition for en banc rehearing, and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing and the petition for rehearing en banc are DENIED.

Supreme Court, U.S.
FILED
MAR 22 2002
CLERK

(2)

No. 01-1075

IN THE

Supreme Court of the United States

UNITED STATES EX REL. ABRAHAM GALE,

Petitioner,

v.

ZENITH DATA SYSTEMS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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STATEMENT PURSUANT TO RULE 29.6

Zenith Data Systems ("ZDS") certifies that as of 1994 it was a subsidiary of Bull Data Systems, Inc., a Delaware corporation; that it became a wholly-owned subsidiary of Packard Bell NEC, Inc. (then known as Packard Bell Electronics, Inc.) commencing April 3, 1996; that it merged into Packard Bell NEC, Inc. effective March 31, 1997; that thereafter it continued business as the "Zenith Data Systems Division" of Packard Bell NEC, Inc. for approximately a year; that, to the extent it had not previously ceased operations, it totally ceased doing business by December 31, 1999, the date Packard Bell NEC, Inc. ceased operations; and that Packard Bell NEC, Inc. changed its name to PB Electronics, Inc. ("PB") effective April 3, 2000. ZDS further certifies that shares of PB (and its predecessors) are not (and were never) traded on any public exchange. ZDS further certifies that the present stockholders of PB are (i) NEC Corporation, a Japanese corporation, which owns approximately 88% of PB's capital stock, and (ii) Bull S.A., and Bull Data Systems, Inc., a subsidiary of Bull S.A., which together own approximately 12% of PB's capital stock; that the shares of NEC Corporation are traded on the public exchange of Japan; that American Depositary Receipts of NEC Corporation are traded in the United States on the New York Stock Exchange; and that the shares of Bull S.A. are traded on the public exchanges of France, Germany and Switzerland.

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Other Authority:

Boese, Civil False Claims and Qui Tam Actions, § 4.02[D][1][e] (2001-2 Supp.) 6

STATEMENT OF THE CASE[1]

A. The Underlying Facts

Petitioner Abraham Gale ("Mr. Gale" or "Petitioner") filed his complaint under the False Claims Act ("FCA"), 31 U.S.C. § 3729 *et seq.*, against Respondent Zenith Data Systems Corporation ("ZDS" or "Respondent") in April of 1996. In his complaint, Petitioner claimed that Respondent had sold to the Government, as new, computers that included recycled components.

Petitioner worked for non-party Packard Bell NEC, Inc. ("PBNEC"), for approximately 10 weeks in late 1994.[2] Several months after he was terminated by PBNEC during his probationary period, Petitioner filed a False Claims Act lawsuit against PBNEC, claiming that PBNEC had committed fraud against the Government by selling to the Government, as new, PCs that contained used parts.

During the course of the Government's PBNEC investigation, the Government learned of a possibility of fraud by another company, ZDS. As found by the District Court, in 1994 and 1995 PBNEC and ZDS were separate companies. (App. B, 26a.) Bull S.A., a French corporation, was an affiliate of ZDS. Bull S.A. (not ZDS) also owned

---

1. For a more complete statement of the relevant facts and procedural history, Respondent respectfully refers the Court to the Ninth Circuit opinion, *Seal v. Seal*, 255 F.3d 1154 (9th Cir. 2001), attached as Appendix A ("App. A") to the Petition for Certiorari ("Pet.") at pages 1a-17a.

2. During the period of Petitioner's employment, PBNEC was known by its former name – Packard Bell Electronics, Inc.

20% of PBNEC (at the time known as Packard Bell Electronics, Inc.). Pursuant to a joint manufacturing arrangement in effect in 1994 and 1995, PBNEC manufactured certain desktop computers for ZDS.[3]

The Government learned of the possibility of ZDS fraud not from Petitioner, but from PBNEC's arch rival, Compaq Computer Corporation ("Compaq"), which had also sued PBNEC for allegedly selling PCs that contained used parts. Based on Compaq's tips, in September of 1995, the United States Attorney's Office ("USAO") opened an investigation of ZDS. The Air Force Office of Special Investigations ("OSI") also launched an investigation of ZDS at the request of the USAO.

By no later than March 25, 1996, the Government's lawyers mentioned to Petitioner that they had learned months earlier from Compaq that ZDS had potentially sold PCs to the Government that contained used components. Less than a month after learning this information from the Government, Petitioner filed a brand new FCA lawsuit, this time against ZDS.

B. Jurisdiction Under The False Claims Act

31 U.S.C. §§ 3730(e)(4)(A) and (B) limit the courts' jurisdiction under the False Claims Act. As relevant here, the court must first determine whether, before the date the complaint was filed, there has been a "public disclosure" in one of the enumerated fora of the "allegations or transactions" on which the claim is based. If there has been no "public

3. In April 1996, ZDS became a wholly-owned subsidiary of PBNEC. In 1997, ZDS became a division of PBNEC.

disclosure," the court has jurisdiction over the FCA action even if the relator was not the "original source" of the information. If, however, the allegations or transactions were publicly disclosed, the relator may bring suit only if he or she was an "original source" of the information on which the allegations are based. (App. A, 7a-8a.)

C. The District Court's Dismissal Of The Action

The District Court held a three day evidentiary hearing to determine whether it had jurisdiction over Petitioner's FCA complaint against Respondent, at which time Petitioner, various Government agents, attorneys in the USAO, and others testified. In his testimony, Petitioner claimed that he learned of the alleged ZDS fraud during his short employment with PBNEC in late 1994 and as a result of his own independent investigation conducted after he was fired by PBNEC, but prior to the Government's disclosure to him of any facts or allegations concerning the alleged ZDS fraud.

The District Court concluded that Petitioner did not learn about the alleged ZDS fraud from either his experiences at PBNEC or from any independent investigation prior to the Government's disclosures to him. The District Court rejected Petitioner's contrary testimony, stating: "inconsistencies in Mr. Gale's testimony abound. We find that Mr. Gale's testimony is not credible." (App. B, 21.) The District Court noted that Petitioner's testimony on these issues was contradicted by testimony from other, more credible witnesses, and that the Court's factual findings were also supported by the absence of any references to ZDS in any of the various documents submitted by Petitioner to the Government prior to the filing of his FCA complaint against Respondent. (App. B, 19a-22a.) Among other things, the

District Court found that Petitioner's counsel had no knowledge of ZDS prior to filing the PBNEC complaint in April 1995 (App. B, 20a.), that "[Mr.] Gale was never an employee of [ZDS] and was not an 'insider' who was otherwise involved in or knew about the [ZDS] fraud before the Government disclosed it to him" (App. B, 24a.), that prior to filing his action against Respondent "Mr. Gale never told the Government that he had any personal knowledge of [ZDS]" (App. B, 21a.), and that Petitioner mentioned nothing about the "contracts and sales [between ZDS and the Government] in either his [ZDS] Complaint or his Written Disclosure of Relator filed in the [ZDS] case." (App. B, 22a.)

After finding that Petitioner had no knowledge of the alleged ZDS fraud prior to, or independent of, the Government's disclosure to him, the District Court held that the Government's disclosures to Petitioner about the alleged ZDS fraud constituted a "public disclosure" under § 3730(e)(4)(A), and that Petitioner was not an "original source" under § 3730(e)(4)(B). (App. B, 24a-25a.) The District Court found that "the only connection between [Mr.] Gale's Packard Bell allegations and the resulting allegations against [ZDS] is that during the course of generally investigating Packard Bell, AUSA Hershman came across information regarding possible [ZDS] fraud." (App. B, 26a.) The District Court held that this "tenuous connection between the information provided to the Government about one company (Packard Bell) and the resulting allegations against another, separate company ([ZDS])" (App. B, 26a.) was insufficient to support a finding that Petitioner was the "original source" of the ZDS allegations. Based on these holdings, the District Court

dismissed Petitioner's FCA complaint against Respondent on the grounds that the Court lacked jurisdiction over the complaint.

D. The Ninth Circuit's Decision Affirming The Dismissal

Petitioner changed the focus of his arguments before the Ninth Circuit. In lieu of depending on his now-discredited testimony, Petitioner contended that the District Court had jurisdiction over his FCA complaint against Respondent even under the facts as found by the District Court. The Ninth Circuit rejected Petitioner's arguments, and affirmed the judgment of the District Court, concluding that the Government's disclosures to Petitioner constituted "public disclosures" and that Petitioner's role in prompting the Government to initiate an investigation *into PBNEC* was insufficiently connected to the separate investigation into alleged fraud *by ZDS* to consider Petitioner to be an "original source" of the ZDS allegations.

The Ninth Circuit concluded that "[Mr.] Gale was an outsider to the [ZDS] investigation" (App. A, 13a.) at the time that Government lawyers "informed [Mr.] Gale that there was a possibility that some [ZDS] computers sold to the Government had contained used PBNEC parts." (App. A, 4a.) The Ninth Circuit also observed that "[Mr.] Gale played no active role in any Government investigation, and [Mr.] Gale obtained his information about [ZDS] from the Government." (App. A, 17a.) Finally, the Ninth Circuit concluded that at the time the allegations were first brought against ZDS, "it was a separate company from PBNEC, the company named by [Mr.] Gale in his original disclosure." (App. A, 17a.)

The Ninth Circuit expressly limited its holding on the "public disclosure" issue to the specific facts of this case: (1) disclosure to an "outsider" who was not employed by the FCA defendant, (2) who had no knowledge of the alleged fraud prior to the Government's disclosures and learned of it from those disclosures, and (3) who seeks to take advantage of the disclosures by filing an FCA action.

> Disclosure of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure. . . . [I]t is public as to Gale, in the sense necessary to the sensible operation of § 3730(e)(4)(A). Because it was disclosed to an outsider to the investigation who now seeks to profit from it as an FCA relator, it was publicly disclosed to that person.

(App. A, 14a.)

In holding that Petitioner was not an "original source" of the public disclosure of the alleged ZDS fraud, the Ninth Circuit clarified the test previously set forth in its earlier decision in *United States ex rel. Barajas v. Northrop*, 5 F.3d 407 (9th Cir. 1993).[4] Rather than interpret *Barajas* to mean that a relator will be considered an "original source" so long as he or she played some part, no matter how remote, in the public disclosure, the Ninth Circuit limited the *Barajas* holding, and explained that the determination of "original source" status must also consider

4. Before the Ninth Circuit's clarification in the decision below, the *Barajas* holding was described as the "broadest holding of original source eligibility to date. . . ." Boese, Civil False Claims and Qui Tam Actions, § 4.02[D][1][e] (2001-2 Supp.).

> (1) the degree to which the relator's information helped uncover the later allegations;
>
> (2) the degree to which other private actors helped uncover those allegations;
>
> (3) the degree to which the government played a role in uncovering those allegations; and
>
> (4) whether the later allegations are brought against the same entity as the earlier allegations.

(App. A, 16a.)

After considering these factors as applied to the facts before it, the Ninth Circuit held that Petitioner was not an "original source" of the public disclosure of the alleged ZDS fraud because his involvement in the PBNEC claims (his sole connection to the ZDS allegations) was insufficient in and of itself to qualify him as an "original source" as to the ZDS allegations. The Ninth Circuit concluded that dismissal of Petitioner's action against Respondent "is consistent with Congress' intent that the FCA not be used by people attempting to 'free ride' on information obtained from the Government." (App. A, 14a.)

REASONS FOR DENYING THE WRIT

I. SUMMARY OF ARGUMENT

The Court should deny the petition for writ of certiorari because:

1. The Ninth Circuit's decision below is highly fact specific and limited. The facts in this case are unique, and the decision is expressly limited to those unique facts. The "public disclosure" holding is specifically limited to "outsiders" who are "strangers to the fraud" and who seek to reap a financial advantage as a result of information of which they first became aware as a result of the Government's disclosure. The "original source" holding is similarly limited. Petitioner had no direct or independent knowledge of any alleged fraud *by Respondent* – he learned of the alleged ZDS fraud only as a result of the Government's disclosures to him. Petitioner's only claimed connection to the alleged ZDS fraud was the fact that he filed an action about alleged fraud at an entirely separate company (PBNEC). While the investigation into PBNEC ultimately led to a third party (Compaq) making allegations to the Government of fraud by Respondent, the Ninth Circuit correctly concluded that this connection, standing alone, was insufficient to satisfy the statutory requirement that Petitioner have "direct and independent knowledge of the information on which the allegations are based. . . ." (§ 3730(e)(4)(B).)

2. The Ninth Circuit's decision below does not conflict with any decisions of any other circuit. Petitioner attempts to "create" conflicts by twisting the holdings in this case and in the allegedly conflicting cases, by divorcing the language

of the other cases from the facts at issue therein (and ignoring the significant factual distinctions between this case and those other cases), and by reliance on his own skewed version of the facts in this case (including facts that are contrary to the factual findings of the District Court). Petitioner even goes so far as to premise one of his Questions Presented on facts that are contrary to the factual findings below. Even with these machinations, however, Petitioner still fails to demonstrate the existence of any conflict between the Ninth Circuit's decision here and any decisions in the other circuits.

In his haste to create conflicts with other circuits, Petitioner loses sight of the very limited scope of the holding in this case. The Ninth Circuit did not hold that *any* disclosure to even a single person constitutes a "public disclosure," or that a person who is the "original source" of an investigation can *never* be considered the "original source" of information or allegations learned in that or a separate investigation. *Those* issues are not raised by the Petition.

3. The Ninth Circuit's decision correctly applied §§ 3730(e)(4)(A) and (B) of the False Claims Act to the facts found by the District Court. Petitioner – who was an employee of PBNEC, a "separate company" from ZDS – did not learn about the alleged ZDS fraud from either his experiences at PBNEC or from any independent investigation prior to the Government's disclosures to him. Rather, Petitioner was an outsider to the ZDS investigation, played no active role in that investigation, and only obtained his information about ZDS as a result of the Government's disclosure to him. The Ninth Circuit correctly held that, under these facts, the Government's disclosure of allegations of ZDS fraud to Petitioner constituted a "public disclosure" as that term is used in the statute and that Petitioner was not

an "original source" of the public disclosure because he did not have "direct and independent knowledge of the information on which the allegations [against ZDS] [were] based. . . ." (§ 3730(e)(4)(B).)

4. The Ninth Circuit decision is consistent with the intent of the False Claims Act. "A 'whistleblower' sounds the alarm; he does not echo it." *Wang v. FMC Corp.*, 975 F.2d 1412, 1419 (9th Cir. 1992). Petitioner did not "sound the alarm" about alleged fraud by Respondent. He simply "echoed" the allegations disclosed to him by the Government. The False Claims Act was designed to provide " 'adequate incentives for whistle-blowing insiders with genuinely valuable information [while discouraging] opportunistic plaintiffs who have no significant information to contribute on their own.' " *United States ex rel. Devlin v. California*, 84 F.3d 358, 362 (9th Cir. 1996) (quoting *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645, 649 (D.C. Cir. 1994)). Petitioner is just such an "opportunistic plaintiff." He should be discouraged, not rewarded. As noted by the Ninth Circuit itself, its holding is consistent with congressional intent to discourage parasitic lawsuits which seek a "free ride on information obtained from the government." (App. A, 14a.)

Petitioner correctly states that the proper focus of the analysis is "not on what the Government 'knows' but on what the relator brings to the case." (Pet., 5.) However, Petitioner ignores the fact that he brought nothing to the case *against ZDS*. As determined by both the Ninth Circuit and the District Court, Petitioner was a complete stranger to the alleged ZDS fraud, and first learned of it from the Government's disclosures to him. It is only by ignoring the facts and twisting the law that Petitioner can contend that "this case [is] an

ideal vehicle to resolve the mass confusion among the circuits" concerning the "original source" and "public disclosure" issues. (Pet., 5 n.1.) An "ideal vehicle" for resolving the purported confusion concerning the "original source" and "public disclosure" issues would be a case which directly raised issues as to which there is a conflict. This is not such a case.

II. THE NINTH CIRCUIT'S HOLDING ON THE "PUBLIC DISCLOSURE" ISSUE IS FACT SPECIFIC AND DOES NOT CONFLICT WITH DECISIONS IN OTHER CIRCUITS[5]

The Ninth Circuit's holding on the "public disclosure" issue was very limited. Specifically, it held:

> Disclosure [by the Government] of information to one member of the public, when that person seeks to take advantage of that information by filing an FCA action, is public disclosure. It may

---

5. Petitioner also contends that the Ninth Circuit's decision here "conflicts with other panels of the Ninth Circuit. . . ." (Pet., 7-10.) Petitioner is incorrect. The allegedly-conflicting decisions within the Ninth Circuit (*Barajas, supra*; *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416 (9th Cir. 1991); and *United States ex rel. Schumer v. Hughes Aircraft Co.*, 63 F.3d 1512 (9th Cir. 1995), *vacated on other grounds in Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939 (1997)) are distinguishable from the present case on their facts. *Barajas* was also clarified and limited by the panel here. More importantly, even if there were a conflict between the Ninth Circuit's decision below and other decisions within the Ninth Circuit (which there is not), such an intra-circuit conflict would not be a sufficient basis for granting a writ of certiorari. *Davis v. United States*, 417 U.S. 333, 340 (1974).

> not be public disclosure as to some other member of the public who independently comes upon information already possessed by the government and disclosed to a person like Mr. Gale, and who then files an FCA action based on the information independently obtained. But it is public *as to Gale*, in the sense necessary to the sensible operation of § 3730(e)(4)(A). *Because it was disclosed to an outsider to the investigation who now seeks to profit from it as an FCA relator, it was publicly disclosed to that person.*

(Emphasis added.) (App. A, 14a).

Petitioner contends that this holding "expressly conflicts with other cases from other circuits that require objective and affirmative acts of disclosure to the general public. . . ." (Pet., 10.) However, the allegedly conflicting authorities fail to support Petitioner's arguments. Those arguments are also dependent, in large part, on Petitioner's personal characterization of the facts at issue in this litigation – a characterization that is (a) inconsistent with the conclusions reached by the Ninth Circuit and the factual findings of the District Court, and (b) made by an individual whose prior testimony has already been found to be "not credible." (App. B, 20a-22a.) Stated succinctly, Petitioner fails to demonstrate any basis to grant certiorari to review the Ninth Circuit's decision on the "public disclosure" issue.

A. The "Public Disclosure" Decisions From Other Circuits Which Purportedly Conflict With The Ninth Circuit's Holding Are Not In Conflict

Petitioner argues that the Ninth Circuit's decision below conflicts with cases from certain of the other circuits on the "public disclosure" issue. However, the artificial conflicts which Petitioner attempts to assert are not supported by the cases he cites. Specifically, the first conflict invented by Petitioner is one between "objective and affirmative acts of disclosure to the general public . . ." (Pet., 10.), and "private disclosure[s]." (Pet., 13.) The second purported conflict which Petitioner pretends exists is one between the present decision and those decisions holding that "federal employees can be relators. . . ." (Pet., 14.) Neither conflict actually exists.

1. There Is No Conflict Between The Ninth Circuit's Decision And Other Circuit Decisions That Petitioner Arbitrarily Labels As Requiring "Objective And Affirmative Acts Of Disclosure To The General Public."

The purported conflict between "objective and affirmative acts of disclosure to the general public . . ." and "private disclosures" is an imagined one. This distinction appears in neither the cases cited by Petitioner, nor in the present case. He simply lines up cases on one side or the other of a purported distinction which the cases themselves do not involve.

As acknowledged by Petitioner, the Ninth Circuit's decision below is consistent with the approach taken in several circuits. At page 12 of his brief, Petitioner cites to

several cases which he contends are consistent with the decision below: *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Fine v. MK - Ferguson Co.*, 99 F.3d 1538 (10th Cir. 1996); *United States ex rel. Fine v. Advanced Sciences, Inc.*, 99 F.3d 1000 (10th Cir. 1996), *United States ex rel. Foust v. Group Hospitalization & Medical Services, Inc.*, 26 F. Supp. 60 (D.D.C. 1998); and *United States ex rel. Gold v. Morrison – Knudsen Co.*, 870 F. Supp. 457 (N.D.N.Y. 1994). The consistent thread in these cases is that each holds that a disclosure of information pertaining to alleged fraud, to non-government persons or entities who are strangers to the alleged fraud, constitutes a "public disclosure." Thus, these cases are all consistent with the Ninth Circuit's focus on the fact that Petitioner was an "outsider" and a "stranger to the fraud."

Obviously, the existence of consistent holdings among the circuits is not a basis for granting certiorari. The important point for purposes of this Court's analysis is that none of these cases supports the existence of Petitioner's purported conflict between cases requiring "objective and affirmative acts of disclosure to the general public" and those involving "private disclosures." Similarly, none of the decisions which Petitioner contends conflict with the Ninth Circuit's decision support the existence of this purported conflict.

Contrary to Petitioner's argument (Pet., 13.), there is no conflict with the Seventh Circuit's holding in *Hindo v. University of Health Sciences/The Chicago Medical School*, 65 F.3d 608, 613 (7th Cir. 1995). In *Hindo*, the parties to the purported disclosure were non-governmental co-defendants. Neither of the parties to the communication was an "outsider" or a "stranger to the fraud." The purported "public disclosure"

was a conversation between the two parties *concerning a transaction between those parties*. *Hindo* did not involve an "outsider." Accordingly, it is clearly distinguishable from the Ninth Circuit's decision below. Just as clearly, *Hindo* does not "expressly repudiate" the Ninth Circuit's decision here.[6]

Petitioner is also wrong in his argument that "the panel's analysis was also squarely rejected by the Tenth Circuit in *United States ex rel. Ramseyer v. Century Health Care Corp.*, 90 F.3d 1514, 1519-20 (10th Cir. 1996)." (Pet., 13.) *Ramseyer* concerns a state agency report that was specifically kept confidential from the general public and was never made available to anyone other than one state agency head and the defendants. The District Court had dismissed the FCA complaint on the grounds that "because the . . . Report was available to the general public upon a written request, the 'allegations or transactions' therein were 'public[ly] disclos[ed]' within the meaning of 31 U.S.C. § 3730(e)(4)(A)." 90 F.3d at 1518. The Tenth Circuit rejected the District Court's analysis, holding only that "'public disclosure' signifies more than the mere *theoretical* or *potential* availability of information." (Emphasis added.) *Id.*, at 1519. The fact that *Ramseyer* found no "public disclosure" under these circumstances poses no conflict with the present decision. Here, there was an *actual* disclosure by the Assistant U.S. Attorney to Petitioner. Again, it is disingenuous to argue that *Ramseyer* "squarely rejected" the Ninth Circuit's analysis here.

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6. Also distinguishable on the same grounds is *United States ex rel. Durcholz v. FKW, Inc.*, 997 F. Supp. 1159 (S.D. Ind. 1998), *dismissal aff.'d on other grounds*, 189 F.3d 542 (7th Cir. 1999), which also involved conversations between private co-defendants.

Similarly, there is no conflict with *United States ex rel. Rabushka v. Crane Co.*, 40 F.3d 1509, 1513-1514 & n.2 (8th Cir. 1994). *Rabushka* is inapposite. It held only that the quantum and quality of the information disclosed was insufficient to constitute a "public disclosure" because it did not raise an inference of fraud. The *Rabushka* Court also noted in dicta that disclosures in corporate reports are not, by themselves, within the specified fora set forth in 31 U.S.C. § 3730(e)(4)(A). *Rabushka* did *not* hold that disclosures to creditors or in corporate reports are not "public." More importantly, *Rabushka* did not concern information given to a private citizen by the Government.

There is also no conflict between the Ninth Circuit's decision below and cases concerning disclosures in response to FOIA requests. (See cases cited at Pet., 12-13 and n.10.) The Ninth Circuit's decision does not concern FOIA requests. Therefore, cases addressing whether such disclosures constitute "public disclosures" in one of the enumerated fora pose no conflict with the present decision.

The Ninth Circuit's decision below also does not conflict with the Seventh Circuit's holding in *United States v. Bank of Farmington*, 166 F.3d 853, 861 (7th Cir. 1999). That case merely held that disclosure by a private citizen "to a public official with direct responsibility for the claim in question" constitutes a "public disclosure." The present decision involves disclosure in the opposite direction –a disclosure *by* the responsible public official, not a disclosure *to* that public official. Accordingly, there can be no conflict between the two decisions.

Unable to demonstrate any actual conflict with the Ninth Circuit's decision below, Petitioner attempts to "create"

a conflict by arguing that this case is somehow aligned with cases "holding that potential or theoretical availability to the general public is sufficient to trigger the ['public disclosure'] bar." (Pet., 11.) However, the *potential* or *theoretical* availability of the disclosed information to the general public was not the basis for the Ninth Circuit's decision below. The Ninth Circuit's decision looked to the *actual* disclosure of the ZDS allegations to Petitioner. Nowhere in the opinion is this actual disclosure tied to any potential disclosure to others. Thus, the Third Circuit's holding in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1155-56 (3d Cir. 1991) (theoretical availability to the public of "unfiled discovery material" triggers the "public disclosure" bar), is not implicated here.[7]

In any event, it is of no moment to this Court's assessment of the Petition that there may be a conflict between the Third Circuit on the one hand, and the remaining circuits on the other, over the issue of whether potential availability to the general public constitutes a "public disclosure." *That* conflict cannot be resolved by granting certiorari in this case.

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7. Petitioner also argues that decisions from the Second Circuit hold that potential or theoretical availability to the public triggers the "public disclosure" bar. However, the only Second Circuit case he cites, *Doe*, *supra*, actually rejects the Third Circuit's holding that mere theoretical availability of the information to the general public is sufficient. *Doe*, 960 F.2d at 322-323. Accordingly, it is unclear why Petitioner believes that the Second Circuit is in accordance with the Third Circuit on the "potential availability" issue.

2. There Is No Conflict With Decisions Holding That Federal Employees Can Be Relators

Petitioner is also incorrect in his argument that the Ninth Circuit's decision "also conflicts with decisions holding that federal employees can be relators. . . ." (Pet., 14.)[8] Petitioner fails to explain how or why there is a conflict with these cases. In fact, no conflict exists. Petitioner was not a federal employee. Therefore, the cases are all easily distinguished. Moreover, the cited cases hold only that there is no "public disclosure" when the "relator-as-government-employee" discloses information to himself or herself as the "relator-as-private-citizen." Nothing in the Ninth Circuit's decision below conflicts with the refusal to recognize the artificiality of a purported "disclosure" by a relator to himself or herself. The opinion in the present case is limited to its facts and does not concern federal employees as relators.

B. Petitioner's Assertion Of A Conflict Is Dependent Upon His Attack On The Factual Findings Of The District Court

Petitioner's attempt to create a conflict is also premised on factual assumptions that are inconsistent with the record. Petitioner argues that he "was not an 'outsider'. . . ." (Pet., 9.) This contention, however, is contrary to the conclusions of the Ninth Circuit. ("Gale was an outsider to the [ZDS] investigation. . . .") (App. A, 13a.) He was also

8. In support of this argument, Petitioner cites *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma Water Agency*, 929 F.2d 1416 (9th Cir. 1991); *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990); *United States ex rel. Givler v. Smith*, 750 F. Supp. 72, 75 (E.D. Pa. 1991); and *Erickson ex rel. United States v. Am. Inst. of Bio. Sciences*, 716 F. Supp. 908 (E.D. Va. 1989).

an "outsider" to ZDS itself – Petitioner was employed by PBNEC, not ZDS, and was not aware of any alleged ZDS fraud from his experiences at PBNEC. (App. B, 22a.)

Petitioner also argues that both the Ninth Circuit and the District Court were incorrect in concluding that there was a "separate investigation" of ZDS. ("Contrary to the panel's assumption, . . . there was no separate ZDS investigation.") (Pet., 10.) This purported "assumption" is actually based on the District Court's factual finding that the USAO "launched an investigation of ZDS" in September 1995 (months after the filing of Petitioner's FCA lawsuit against PBNEC). (App. B, 23a.) An argument taking issue with the factual findings below is inappropriate for a writ petition.

Petitioner's general assertion of the existence of conflicts with other decisions is based in large part upon his attempt to restate the facts to bring this case within the confines of the holdings of the other cases at issue. However, Petitioner was not an "insider" – he was never an employee of ZDS and knew nothing about alleged ZDS fraud from his employment with PBNEC. (App. B, 25a.) This case is therefore distinguishable from cases involving disclosures to employees of the target of the investigation or to other participants in the fraudulent transactions. Similarly, Petitioner cannot create a conflict with those cases holding that there is no "public disclosure" when evidence is disclosed during discovery *in the relator's existing FCA action* (e.g., *Wang* and *Hagood*), simply by characterizing the ZDS investigation as occurring "in the same suit" (as opposed to a "separate investigation") as his FCA action against PBNEC. Petitioner's version of the facts was rejected as not credible by the District Court. He cannot now rely on that rejected version of the facts to create a conflict.

Petitioner's "liberality" with the facts also infects the questions he presents for review. Contrary to the assertion in his first Question Presented, the Assistant U.S. Attorney's oral disclosures regarding allegations of ZDS fraud did not occur "during an ongoing investigation in a sealed case. . . ." Rather, as noted above, the District Court found that a separate investigation of the allegations of ZDS fraud was initiated in September 1995, prior to the Government's disclosures to Petitioner (App. B, 23a.), as distinct from the investigation in Petitioner's separate *sealed* FCA action against PBNEC.[9] The fact that Petitioner's Question Presented is based on a false factual premise is sufficient, in and of itself, to support this Court's denial of certiorari.

The issue before this Court is not whether to grant certiorari in some hypothetical case invented by Petitioner. The issue is whether certiorari should be granted in *this* case. It is respectfully submitted that Petitioner's attempts to argue the factual findings of the District Court to create the requisite conflict, and his attempts to twist the holding of the Ninth Circuit, are strong evidence of the lack of merit to his Petition.

C. Petitioner's Remaining Arguments On The Public Disclosure Issue Lack Merit

Petitioner also attacks the limitation of the Ninth Circuit's holding that there was a "public disclosure" as to Petitioner (but not necessarily as to other members of the

9. Petitioner's assertion that the Assistant U.S. Attorney's oral disclosures to him were "private confidential [and] privileged" is also unsupported by any factual findings below. Respondent and the USAO have always contended throughout this litigation that any agreement governing the confidentiality and use of information discovered by Petitioner in reviewing documents subpoenaed by the Government from PBNEC did not extend to any oral statements between the Assistant U.S. Attorney and Petitioner.

public). (App. A, 14a.) Petitioner argues that if he "is barred by the disclosure, as an outsider and member of the public, then so must be the public at large." (Pet., 10.) First, the Ninth Circuit's statement regarding this issue is dicta. Moreover, Petitioner's argument also ignores the qualification that the Ninth Circuit's discussion is directed to a "member of the public who independently comes upon information already possessed by the government . . . , and who then files an FCA action based on the information independently obtained." (App. A, 14a.) Thus, the Ninth Circuit's decision is merely restating the law that an FCA action by an "original source" will not be barred by a prior public disclosure.

There is also no merit to Petitioner's argument concerning the "ordinary meaning" of the term "public disclosure" and the intent of Congress in that regard. (Pet., 7 and 18-21.) The dictionary definitions referenced by Petitioner do not address the issue here – whether a "public disclosure" must be a disclosure to the "public at large" rather than a disclosure to a single member of the public. None of the cases that Petitioner cites holds that a disclosure is disqualified from being a "public disclosure" merely because it is to a single person. Indeed, the courts have found the existence of a "public disclosure" based on disclosure to a single person who is an "outsider," (*see, e.g., Fine v. Advanced Sciences*, 99 F.3d at 1005-1006 (disclosure to single representative of the AARP)), or based on disclosure to a limited group of people who are outsiders (*see, e.g., Doe, supra*, and *Foust, supra*).[10]

10. *See also, Consumer Product Safety Comm. v. GTE Sylvania, Inc.*, 447 U.S. 102, 108-109 (1980) (construing the term "public disclosure" as used in the Consumer Product Safety Act, 15 U.S.C. § 2055, to include within the term "public" a person who is a FOIA requester).

Contrary to Petitioner's assertion, the Ninth Circuit's decision here also does not reinstitute the "government knowledge" defense. The Ninth Circuit found a public disclosure based on the Government's actual disclosure to Petitioner, not merely because the Government possessed information within its files.

Petitioner's proffered evidence of purported congressional intent that "public disclosure" means "disclosure to the public at large" should also be disregarded by this Court. Representative Berman's statement in that regard quoted in the Petition (Pet., 19.), was made thirteen years after the 1986 amendments to the FCA. Such post-enactment pronouncements by congressional sponsors are irrelevant to the determination of congressional intent. *See United States ex rel. Hafter v. Spectrum Emergency Care, Inc.*, 190 F.3d 1156, 1161 n.6 (10th Cir. 1999) (declining to give any weight to the same remarks by Representative Berman).

The Ninth Circuit's decision below also does not raise the specter of jurisdictional bars against relators who have spent significant time and resources in investigating fraud. The only relators who might be adversely affected by the Ninth Circuit's decision in this regard are persons, such as Petitioner, who have no independent knowledge of the fraud and who in lieu of such knowledge seek to take advantage of the Government's investigative efforts for their own private financial gain. Relators with direct and independent knowledge of the fraud (i.e., "original sources") will not be affected by the Ninth Circuit's construction of "public disclosure."

Cases discussing the fora within which a disclosure must be made (*See, e.g.*, Pet., 11 n.7, 8 and 9) are also irrelevant. The disclosures at issue herein occurred in an "administrative . . . investigation" as required by § 3730(e)(1). As expressly stated in the Ninth Circuit's opinion, "the Air Force Office of Special Investigations ('OSI') also launched an investigation of [ZDS] at the request of the USAO." (App. A, 3a.) An investigation by the OSI is an "administrative investigation." *Doe*, 960 F.2d at 319 and 323. Because the Assistant U.S. Attorney's disclosures to Petitioner occurred within the scope of the joint OSI/ DOJ investigation, they occurred in an "administrative investigation." Petitioner did not even raise this "fora" issue in his briefs before the Ninth Circuit. The forum within which the disclosures took place is not an issue.[11]

Finally, Petitioner's argument for a "bright line" standard of public disclosure (Pet., 20.) is also not supported by the language of the FCA. It is impossible to reconcile the FCA's inclusion of "administrative investigations" among the public disclosure fora with Petitioner's complaint that "there are no bounds as to when an investigation begins and ends, and virtually no limits on documentary and oral contact with the 'outside' that could trigger the bar." (Pet., 20.)

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11. Although the Ninth Circuit discussed the issue of the exclusivity of the fora enumerated in the FCA, that discussion was unnecessary to its holding in light of the fact that the OSI investigation was, in fact, an "administrative investigation" within the meaning of the statute. Accordingly, the panel's discussion of the fora issue is not an appropriate basis on which to premise a grant of certiorari.

III. THE NINTH CIRCUIT'S HOLDING ON THE "ORIGINAL SOURCE" ISSUE IS FACT-SPECIFIC AND IS NOT IN CONFLICT WITH DECISIONS FROM OTHER CIRCUITS

Petitioner argues that the Ninth Circuit's decision conflicts with other circuits, the language of the FCA and congressional intent, in its failure to treat Petitioner as an "original source" of the allegations in his ZDS complaint. Specifically, Petitioner contends that because he "was the original source of information about alleged fraud at PBNEC, and [his] information prompted the government to initiate an investigation into that company which "started the government on the trail that eventually led to ZDS's alleged fraud," (App. A, 16a-17a.), he is *necessarily* an "original source" of the ZDS allegations. (Pet., 15-18.) However, the Ninth Circuit's holding on the "original source" issue does not conflict with any authorities from other circuits. It is also consistent with both the language of the FCA and the intent of Congress. Petitioner's arguments to the contrary are demonstrably incorrect (and, in some cases, dependent on Petitioner's personal interpretation of the "facts," which conflicts with the findings of the Ninth Circuit and the District Court).

A. The Ninth Circuit's Fact-Specific Holding Is Consistent With The FCA's Requirement That An "Original Source" Have Direct And Independent Knowledge Of The Information On Which The Allegations Are Based

31 U.S.C. § 3730(e)(4) provides:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a

> criminal, civil, or administrative hearing, in a Congressional, administrative or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information. (B) For purposes of this paragraph, "original source" means an individual who has *direct* and *independent* knowledge of the information *on which the allegations are based* and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

(Emphasis added.)

Here, both the Ninth Circuit and the District Court concluded that Petitioner learned of no information concerning alleged fraud by Respondent during, or as a result of, his employment by PBNEC. Nor did he learn of the alleged ZDS fraud as a result of any independent investigation prior to the Government's disclosures to him. Rather, Petitioner "obtained his information about [ZDS] from the government." (App. A, 16a-17a; *see, also*, App. B, 19a-22a.) In light of these factual findings, it is difficult to discern how Petitioner could claim to have the requisite "direct and independent knowledge" of the alleged ZDS fraud to satisfy the "original source" standard expressly set forth in the statute.[12] Someone who obtains his or her information from the Government's disclosure has neither "direct" nor

12. *See, e.g., Devlin, supra*, 84 F.3d at 360-363 ("direct" knowledge derives from information obtained firsthand through the relator's own labor, and "independent" knowledge is knowledge obtained prior to the public disclosure).

"independent" knowledge of that information.[13] Rather, as found by the Ninth Circuit below, that person is a "free rider" (App. A, 14a.) whose parasitic lawsuit Congress intended to bar.

Petitioner understandably ignores this statutory language, in apparent recognition of his inability to satisfy the standard. Instead, Petitioner takes language from the opinion in *Barajas*, *supra*, (without addressing the necessary link between that language and the facts in *Barajas)*, and argues that the proper standard is, in essence, a "but for" standard. Under this "but for" test, a relator is an "original source" whenever he or she triggered the investigation that led to the publicly-disclosed information, irrespective of how distant the link was between the relator's original claim and the information or allegations which were "publicly disclosed." However, such a "but for" test finds no support in the statutory language, nor does Petitioner cite any authority supporting such a test. The one case primarily relied upon by Petitioner for this argument – *Barajas* – is clearly distinguishable on several significant points, and was considered and limited by the Ninth Circuit below.

B. The Ninth Circuit's Holding On The "Original Source" Issue Does Not Conflict With Other Circuits

Petitioner contends that the Ninth Circuit's decision on the "original source" issue conflicts with the decisions in other circuits, arguing that "other circuits have held that a

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13. Thus, and contrary to Petitioner's arguments, the Ninth Circuit's decision below did not violate this Court's mandate in *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943) that interpretation of the FCA should be governed by the statutory language and not some vague notion of "policy."

relator need only be an original source of some of the information on which the complaint is based." (Pet., 16.) However, the cases cited by Petitioner fail to support this argument.

United States ex rel. Merena v. SmithKline Beecham Corp., 205 F.3d 97 (3d Cir. 2000) nowhere addresses the issue of the quantum of information the relator must provide to qualify as an "original source." Rather, the Third Circuit remanded the case to the District Court to determine whether the relators were "original sources" with respect to the claims at issue, but without providing any guidance regarding how close the relationship must be between the claims at issue and the claims asserted in the relators' original actions. *Id.* at 107-108. Thus, *Merena* does *not* hold that a relator need provide only "some of the information" supporting the claim to be considered an "original source."

United States ex rel. Fallon v. Accudyne Corp., 97 F.3d 937 (7th Cir. 1996) is completely irrelevant to the issue of the quantum of information necessary to qualify a person as an "original source." *Fallon* involved a single issue – whether the attorney's fees awarded to relator's counsel (after settlement of the FCA claim) were reasonable. *Federal Recovery Services, Inc. v. United States*, 72 F.3d 447 (5th Cir. 1995) actually upheld a dismissal based on the conclusion that the relator was not an "original source." More important, there is nothing in this decision which addresses the issue of the quantum or quality of information that must be supplied to render the relator an "original source." Similarly, *United States ex rel. Semtner v. Medical Consultants, Inc.*, 170 F.R.D. 490 (W.D. Ok. 1997) does not address the quantum or quality of information sufficient to support a relator's status as an "original source."

United States v. CAC-Ramsay, 744 F. Supp. 1158 (S.D. Fl. 1990), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992) is also inapt. In that case, the District Court held that there was no "public disclosure." Absent "public disclosure," no issue arises concerning the relator's status as an "original source."

Thus, none of the cases cited by Petitioner supports his assertion that "other circuits have held that a relator need only be an original source of some of the information on which the complaint is based." Accordingly, the purported conflict between the Ninth Circuit's decision below and these cases from other circuits simply does not exist.[14]

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14. In apparent recognition of the futility of his argument that the Ninth Circuit's holding on the "original source" standard creates a conflict with other circuits, Petitioner focuses much of his argument on attempting to demonstrate a conflict *within* the Ninth Circuit between the panel's holding on the "original source" standard and the earlier holding on that issue in *Barajas*. As noted above, however, intra-circuit conflict is generally not sufficient to support granting a writ of certiorari. *Davis*, *supra*. Moreover, there is no conflict between the Ninth Circuit's decision below and its earlier decision in *Barajas*. Rather, the Ninth Circuit in its decision below clarified *Barajas*, after consideration of the significant factual distinctions between that case and this case. It is also clear that the language in *Barajas* relied upon by Petitioner (a relator "is an 'original source' of allegations 'if he played some part, whether direct or indirect, in the public disclosure. . . .' ") (Pet., 15 n.11.) cannot be a general statement of the governing law because it cannot be reconciled with the statutory requirement that the "original source" have "direct and independent knowledge of the information on which the allegations are based. . . ."

CONCLUSION

For all of the above stated reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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